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Supreme Court of the United States

OCTOBER TERM 1992

NATIONAL BASKETBALL ASSOCIATION,

Petitioner,

—v.—

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 2, 1992

QUESTIONS PRESENTED

1. Whether this Court's holding in *NCAA v. Board of Regents*, 468 U.S. 85 (1984) -- that independent college teams may not lawfully agree to restrict economic competition among themselves -- should now be expanded to condemn rules adopted by a professional sports league, a true joint venture, that restrict economic competition among member teams in order to maintain competitive balance, prevent free-riding, and compete effectively in the national television market?

2. Whether the Sherman Act forbids all commercial joint ventures -- law firms, research and development projects, television production ventures, and the like -- to solve the problem of the free ride by adopting ancillary restraints that limit competition among the venturers?

3. Whether the Sherman Act forbids joint ventures to engage in the exclusive licensing of their product, where such licensing necessarily requires that the co-venturers be prohibited from individually entering into competing licenses with respect to the venture's product?

LIST OF PARTIES

The names of all parties to the proceeding are set forth fully in the caption. Petitioner National Basketball Association is not a corporation and thus has no parent companies and no subsidiaries.

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NATIONAL BASKETBALL ASSOCIATION,

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CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The National Basketball Association petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming a permanent injunction, grounded in the theory that the Sherman Act forbids a professional sports league to restrict economic competition among its member teams, entered by the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The majority and concurring opinions of the court of appeals (App. 1a-18a) are reported at 961 F.2d 667 (7th Cir. 1992). The decision of the district court (App. 19a-72a) is reported at 754 F. Supp. 1336 (N.D. Ill. 1991).

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1992. The court of appeals' order denying a timely petition for rehearing with suggestion for rehearing in banc (App. 73a) was entered on June 4, 1992. The jurisdiction of this Court to review the judgment of the court of appeals by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal....

STATEMENT OF THE CASE

Petitioner challenges the holding below that the Sherman Act requires that the member teams of a professional sports league be treated like an industry composed of completely independent competitors. The courts below held that league restrictions on member teams' independent national telecasting in competition with the league's national networks, NBC and TNT, violate Section 1 of the Sherman Act. Specifically at issue is a rule the NBA adopted that reduced from 25 to 20 the number of NBA games that any individual team could telecast nationally over a superstation (the "20-game rule").

The Parties

Chicago Bulls

Respondent Chicago Professional Sports Limited Partnership ("Bulls"), one of two plaintiffs below, owns and operates the franchise created by the National Basketball Association in Chicago, and fields the Chicago Bulls basketball team. For the past two seasons, the Bulls have won the National Basketball Association championship, and they are now, by virtue of their membership and performance in the league, an enormously popular television attraction.

WGN

Respondent WGN Continental Broadcasting Company ("WGN"), the other plaintiff below, owns and operates WGN, an over-the-air television station in Chicago. WGN is a superstation, meaning that its broadcast signal is picked up by a satellite and retransmitted to many cable television systems across the country. Those cable systems, in turn, make WGN available to their subscribers as a cable channel. Approximately 34 million homes across the nation receive WGN's signal.

NBA

Petitioner National Basketball Association ("NBA"), the defendant below, is a lawful joint venture that was formed in 1946 for the purpose of creating, marketing, and exhibiting high-quality professional basketball games for the entertainment of tens of millions of sports fans across the country. The creation and sale of NBA basketball requires a close collaborative effort among all league members. Through this joint action, the NBA competes as a unit in a variety of different national and local markets against other sports, entertainment, and leisure activities that vie for the attentions of its fans. The NBA is organized as a joint venture under New York law, governed by a board consisting of one representative from each of its 27 teams, and centrally managed by

the Commissioner, who serves as chief executive officer, and a 300-person league office.

As in all professional sports leagues, NBA teams are not and cannot be true economic competitors because the success of each depends upon the economic well-being of the others in order to produce high-quality, evenly-balanced competition throughout the league. As a result, NBA teams are highly interdependent and economically integrated by a common system of governance that determines policy for every aspect of team and league business, and through a multitude of joint production and sales operations, shared financial benefits and burdens, and other cooperative arrangements.

Under NBA rules and operating practices, for example:

- The teams share equally in all revenues from the NBA's national television contracts, sale of league-wide sponsorships, licensing of league and team trademarks and logos, sale of expansion franchises, and a percentage of the proceeds from playoff games;

- Fifty-three percent of the league's aggregate revenues is paid to the players, as required by the NBA's agreement with the players' union;

- Teams are bound by a league-set maximum and minimum on each team's aggregate players' salaries;

- Players from the collegiate ranks are allocated by the annual NBA college draft, which gives the teams with the poorest on-court performance in the prior season the exclusive NBA rights to negotiate with the most talented college players;

- NBA basketball is marketed through a league advertising campaign, using tens of millions of dollars of advertising time the league procures from its national television carriers, NBC and TNT;

- Teams pool and jointly market licensing rights to all team trademarks, logos, and insignia;

- Teams jointly insure against a variety of risks through an NBA-created and -owned insurance company;

- Teams are jointly obligated, in the event one team should lose five or more players in a common disaster, to replenish that team's roster with players from their own teams; and

- Each team has agreed that if it ceases to be a member of the NBA, all its assets, including player contracts, shall revert to the league.

Of all these (and numerous other) joint NBA operations, one of the most critical is the NBA's marketing and sale of national television rights to league games. Revenues from NBA-licensed national telecasting contracts are the single largest source of shared revenues among the teams. Without these revenues, as the district court found, 20 of the NBA's 27 teams would have operated at a loss in the 1989-90 season. App. 23a.

This case concerns that critical practice of joint national television licensing and revenue sharing, and, as a necessary corollary, the league's ability to regulate the number of league games that individual teams may televise nationally in competition with the league's national broadcast and cable networks, NBC and TNT, and with individual teams' local telecasts. The principles to be applied will necessarily determine the lawfulness of every joint business practice in which a professional sports league may engage.

Those broad and critical professional league sport issues -- as well as equally broad and critical issues that pertain to the lawfulness of ancillary restraints adopted by *all* partnerships and joint ventures -- are raised by this specific controversy over the NBA's 20-game rule. The district court, affirmed by the Seventh Circuit, held that the 20-game rule constituted a cartel agreement

among competitors to restrict output in violation of Section 1 of the Sherman Act, and permanently enjoined its enforcement.

Purpose of the 20-Game Rule

A little more than a decade ago, the NBA's performance in the national television market was abysmal. Its fortunes were so low that CBS, then the league's national broadcast network, would televise no more than five regular-season games and aired the final game of both the 1980 and 1981 Championship Series -- the season's single most important contest -- on tape delay, rather than live. App. 10a. The NBA ran a distant third to the National Football League and Major League Baseball in number of games televised, viewership, advertiser interest, and rights fees. NBA games were, by every measure, a decided failure as a television product.

Convinced that the marketing and sale of its national television rights had to be drastically improved, the NBA, in September of 1980, enacted the first in a series of resolutions -- all, until now, supported by the Bulls -- limiting the number of NBA games that an individual team could televise nationally. App. 27a-28a. The 20-game rule represents the latest step in this series of regulations. Teams remain free to telecast all of their games in their home areas.

The purpose of reducing the number of national telecasts by individual teams was to make the NBA's national telecasts progressively more exclusive in order to increase the league's ability to compete more effectively in the national television market. Offering licensees exclusivity in programming is a vital competitive tool, not just in sports broadcasting but in the entire television industry, an accepted fact that was not in dispute below.

Exclusivity has proved to be vital because a network that has exclusive rights to a program can differentiate itself from its competitors by becoming identified with that program and its

cachet; it can also offer advertisers an exclusive forum to advertise their products without dilution by a rival's advertising on the same program on another network; and it allows a network to promote the program without the benefits redounding to a competing network carrying the same show without promotion. By offering its national networks greater exclusivity, the NBA offered a better product and responded rationally to the demands of a highly competitive market.

The NBA's television strategy proved to be a resounding success.[1] Recognizing the efficacy of the measures the league had adopted, the district court concluded that the NBA's television policy was sound and consistent, and was one of the principal reasons for the NBA's "phenomenal economic resurgence" after years of lackluster performance in the national television market. App. 26a.

In the fall of 1989, the NBA signed new four-year national television contracts with NBC, as its national broadcast network, and TNT, as its national cable network. Those contracts will bring the league approximately $875 million over their four years, an amount that is shared equally by all NBA teams. App. 31a-33a. For the previous four years there had been virtually no superstation telecasts, but in 1989 50 new superstation telecasts of NBA games

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[1] As the NBA was increasing the exclusivity granted its national carriers, the league's television output increased dramatically and at a rate that surpassed that of every other major sport. For example, in the five-year period ending with the 1989-90 season, the number of telecasts of NBA games -- broadcast and cable telecasts in local, regional, and national markets -- increased 34.4%. Of all major sports in the United States during this period, only the NBA was able to increase the number of games shown on the national broadcast networks, the carriers that by far reach the largest number of actual and potential viewers. Nationally televised games under the NBA's broadcast and cable network contracts have increased from 59 in the 1981-82 season to 76 in the 1990-91 season, an increase of 28.8%, and the NBA's total television output during the same period grew at a rate that surpassed its nearest rival -- the NFL -- by nearly 20%.

were poised to be shown in competition with the NBC and TNT games, 25 on WGN, which had just become the Bulls' carrier, and 25 on WTBS, an Atlanta superstation which had just become the Atlanta Hawks' carrier. These 50 new games were equal in number to the entire new package of regular season NBA games on TNT (and almost double the number on NBC). Convinced that the new superstation telecasts represented a potent threat to the value of its national television contracts -- present and future -- the NBA's Board of Governors enacted the 20-game rule and a rule that prohibited any team from broadcasting a game over a superstation on the same night as a regularly scheduled telecast of an NBA game on national cable television (the "same-night rule").

Proceedings Below

In October 1990, the Bulls and WGN commenced this action to challenge the 20-game rule, all numerical restrictions on national telecasts by individual teams, and the same-night rule as horizontal conspiracies among the NBA member teams to restrict output in violation of Section 1 of the Sherman Act. The district court severed all issues other than the lawfulness of the 20-game rule so that the case could proceed on a highly expedited basis and, over the NBA's objection, scheduled the trial on the merits to commence six weeks after the complaint had been served. App. 2a, 16a.

After a five-day bench trial, the district court held the 20-game rule unlawful and permanently enjoined its enforcement. Relying on *NCAA v. Board of Regents*, 468 U.S. 85 (1984) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the court concluded that plaintiffs did not have to prove a relevant market or establish that the NBA had market power, because, according to the district court, the NBA teams were independent economic competitors and the 20-game rule was a horizontal restraint on competition. App. 52a-57a; 65a-68a. The initial burden was, instead, on the NBA to establish a procompetitive justification for the 20-game rule. App. 57a. The district court rejected the

procompetitive grounds the league asserted, including the preservation of competitive balance, the control of free-riding, and the enhancement of the exclusivity of the NBA's national television licenses, all designed to promote the ability of the league to compete in the national entertainment market. App. 58a-65a. It then condemned the 20-game rule. App. 65a.

The Seventh Circuit, in an opinion by Judge Easterbrook, affirmed, but its approach differed greatly from that of the district court. The panel recognized immediately that the NBA lacked market power in the national television market for sports and entertainment programming and that exclusive licensing practices in the television industry were widely used and generally benefitted competition. App. 8a, 10a. It also recognized that the number of NBA games on television had increased while the NBA was pursuing its exclusive licensing strategy by limiting superstation telecasts. App. 10a-11a. But notwithstanding the apparent procompetitive benefits of the 20-game rule, and the absence of any potential for harm because of the lack of market power, the panel stated that "[t]he merits of the case turn on the characterization of the NBA." App. 7a.

The panel observed that the proper characterization of a professional sports league was a difficult issue that has "divided courts and scholars for some years...." App. 8a. It then said the district court had characterized the NBA as a joint venture in the production of professional basketball games, but a cartel in the sale of national television rights to its games. *Id.* Yet the district court made findings that undermined this characterization. It found, for example, that in selling national television rights, the teams "act[ ] together as a single economic unit, pooling resources, agreeing not to compete with each other or the league and sharing the risks and benefits of their joint endeavors." App. 23a.

The court of appeals nevertheless adopted the cartel characterization, but also expressed doubt about its accuracy: Since "[s]haring is endemic in league sports[,] [t]he prevalence of

[sharing devices] may suggest the shakiness of treating the clubs, which must cooperate to have any product to sell, as rival 'producers' in the first place." App. 15a. Despite that acknowledgment, the panel rapidly disposed of each of the NBA's asserted justifications for the 20-game rule. With respect to the league's exclusivity defense, the panel recognized that "[p]roducers of a television series commit the episodes exclusively to one network ... in order to compete against the offerings of other ventures.... Marketing strategies such as exclusivity ... must be understood as ways to compete rather than ways to exploit consumers." App. 8a. Yet, because the panel characterized the NBA as a cartel rather than a joint venture, it held that the NBA's exclusivity justification failed as a matter of law. App. 7a-12a.

The panel also rejected the NBA's contention that by preventing the more attractive teams from capitalizing on their current popularity in the national television market for their sole profit at the expense of the weaker teams, the 20-game rule helped to preserve the league's competitive balance. Purporting to rely on this Court's reasoning in *NCAA*, where a competitive balance argument had been rejected on the factual ground that there was no unified league in which competitive balance could have been preserved, 468 U.S. at 117-18, the Seventh Circuit, nonetheless, said that the league's competitive balance justification could not be accepted "[u]nless the Supreme Court is prepared to modify *NCAA*...." App. 16a.

According to the panel, only the NBA's free-riding justification merited extended discussion. The free ride occurred because the Bulls and WGN were reaping the benefit of a national television market for NBA games that had been created by the efforts and investment of others: In particular, all other NBA teams as well as NBC and TNT had invested heavily in promoting the NBA. In addition, the Bulls were free-riding on the generous NBA subsidies that sustained them when they were a weak team, now depriving their fellow teams of similar subsidies by competing

against, and hence diminishing the value of, the league's national television contracts. Finally, WGN, by buying the right to televise NBA games in the national market from the Bulls and thus paying the *league* nothing for those national rights, was free-riding on the decade-long effort of the NBA to create a product with true national appeal. App. 13a.

Although the Seventh Circuit recognized that the Bulls and WGN were securing for themselves benefits and value created by the league and its national television carriers, the panel nevertheless rejected the NBA's free-riding defense on the ground that the league could "levy a charge for each game shown on a superstation, or require the club to surrender a portion of its revenues." App. 14a-15a. According to the Seventh Circuit, "When payment is possible, free-riding is not a problem because the 'ride' is not free." App. 14a. The court then said, however, that even its suggested solution of requiring a payment might itself be illegal.[2] App. 15a-16a.

Finality of the Judgment

The judgment below finally and conclusively holds that the members of a professional sports league are true economic competitors that may not lawfully restrict competition among themselves as other joint ventures are permitted to do. Although the panel's opinion seemed to suggest that further proceedings in the district court might cause the panel to modify its holding, any such implication is illusory.

In petitioning for rehearing with suggestion for rehearing in banc, the NBA argued that if the court of appeals might indeed modify its opinion or the permanent injunction it was affirming,

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[2] Both courts below rejected petitioner's argument that the 20-game rule was immune from antitrust attack by reason of the exemption provided in the Sports Broadcasting Act, 15 U.S.C. § 1291. The issue of immunity is not raised on this petition.

then it should amend the decretal paragraph of its opinion to reflect that lack of finality, in order to suspend the otherwise-preclusive bar of principles of res judicata and collateral estoppel. The Seventh Circuit denied the NBA's petition for rehearing, left the permanent injunction intact, did not order a remand of any sort, and did not in any other way provide a means for the NBA to reopen issues conclusively determined against it in the district court. Indeed, the Bulls and WGN are now seeking in excess of $2 million in attorneys' fees on the basis of the permanent injunction entered by the district court and affirmed by the Seventh Circuit.

Examining the specific issues further demonstrates the finality of their determination below. The two issues the court of appeals mentioned as candidates for potential elucidation were antitrust injury and the status of the NBA as a single entity. App. 4a, 9a. The NBA raised the antitrust injury argument in the district court, which rejected it. App. 47a-52a. It was not preserved for appeal, thus making the district court's determination final. With respect to the argument that the NBA is a single entity incapable of conspiring through the joint action of its members, the district court did not even accord the NBA joint venture status, much less single entity status. App. 23a-25a. The single entity argument also was not raised on appeal, making the district court's finding that the teams are not a single entity conclusive.[3]

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[3] The court of appeals believed that the district court would proceed to consider the lawfulness of the NBA's 25-game rule and its same-night rule. With respect to the 25-game rule, however, the parties are in agreement that the 20-game rule replaced the 25-game rule in the spring of 1990, and the latter is no longer in force. Petitioner, in any event, could offer no justification for the 25-game rule, or any other numerical limitation on superstation games, that both courts below have not already rejected as to the 20-game rule. With respect to the same-night rule, the question of immunity under the Sports Broadcasting Act, 15 U.S.C. § 1291 ("SBA"), is pending in the district court, but resolution of that issue will not affect the broader antitrust issues the Seventh Circuit has decided

(continued...)

REASONS FOR ISSUING THE WRIT

The writ should be granted because the court of appeals' decision creates clear conflicts with decisions of this Court and with decisions of other circuits and has crafted new, important, and erroneous antitrust doctrine. The new doctrine threatens the vitality and perhaps the existence of professional sports leagues, all other joint ventures, the doctrine of ancillary restraints, and the practice of exclusive licensing by television production joint ventures. This case is thus of both great theoretical and commercial importance:

1. The Seventh Circuit has collapsed the clear antitrust distinction between cartels, which are illegal per se, and joint ventures protected by ancillary restraints, which are accorded Rule of Reason analysis. The court erred by applying *NCAA v. Board of Regents*, 468 U.S. 85 (1984), to a professional sports league. *NCAA* held that a consortium of independent amateur college sports leagues and independent amateur college teams was a cartel in the sale of television rights to college football games. The NBA, in complete contrast, is an economically integrated joint venture that competes as a genuine business unit in a variety of markets against other sports, entertainment, and leisure activities. Cartel treatment is economically unfounded and legally insupportable.

Any professional league is possible only because of its teams' ability to act together as a commercial unit and thus prohibit competition between individual members and the league. Destroy that capacity and replace it with an every-team-for-itself free-for-all -- as the Seventh Circuit has -- and one virtually eliminates the

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[1](...continued)
adversely to professional league sports and all other joint ventures. Because the Seventh Circuit has conclusively held that the NBA is to be treated not as a joint venture, but as a cartel in the sale of its television rights, none of the proceedings that may be held in the district court could possibly have the effect of changing the result below.

professional sports league as a viable business entity from the American economy.

This Court has never decided how antitrust should deal with the restraints that are inherent in all professional league sports. The result, as the Seventh Circuit observed, is that the proper analysis of professional sports leagues "is a subject that has divided courts and scholars for some years...." App. 8a. This still unresolved issue has led to seemingly endless litigation. *See infra* note 10 and accompanying text. The law that controls this multi-billion dollar industry badly needs clarification by the Court.

2. The deleterious impact of the Seventh Circuit's decision will be felt far beyond professional league sports. The court of appeals' sweeping and erroneous reformulation of antitrust doctrine has jeopardized all commercial joint ventures -- law firms, research and development projects, television production groups, and all partnerships -- by destroying their capacity to solve the problem of the free ride through the use of ancillary restraints. Most law firms, for example, create efficiency by forbidding their members from representing clients for their individual gain rather than for the benefit of the firm. According to the Seventh Circuit, however, there is no free-riding problem properly solvable by such a restraint because the firm could require the free-lancing partner to pay the firm a share of his fee instead. But the court created further uncertainty by suggesting that the charging of a fee might also be illegal, which would mean that free riding can never be deterred. Both the holding and the suggestion are not only damaging to all joint ventures and partnerships, they also contradict this Court (in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)), and other courts (*e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines*, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987)) that have held restraints to be lawful means of solving the free rider problem.

3. The Seventh Circuit's holding also would prohibit joint ventures from engaging in exclusive licensing of their product.

Television programs often are produced by joint ventures, the members of which are individually capable of competing with one another in licensing the venture's programs. Yet it has been widely recognized, by courts and the FCC among others, that exclusivity is essential to the successful marketing of television programming. If each member of a television production joint venture were free to license the venture's programming in competition with the venture, no television network would want the program or would pay very much for it or promote it. By subjecting exclusive licenses to summary condemnation when the licensor is a partnership or joint venture, the Seventh Circuit's decision jeopardizes both the preferred form of license in the television industry and a practice that has broadly been held to benefit competition.

I. The Seventh Circuit Erred In Applying *NCAA*, A Cartel Case, To A Professional Sports League That Is Necessarily A Joint Venture

The Seventh Circuit clearly erred by relying upon *NCAA*'s holding that a restriction on the sale of television rights, when adopted by a cartel of independent and economically unintegrated colleges, constituted a naked restraint of trade subject to summary condemnation under the Rule of Reason. That holding cannot properly be applied to the vastly different commercial operations of an integrated professional sports league, where the regulation of economic competition among the teams is essential to preserve competitive balance within the league, to prevent currently popular teams from free-riding on the investment and efforts of the others, and to effectively market the league's television rights in competition with other sports and entertainment programming. By incorrectly treating the NBA as a cartel, the Seventh Circuit failed to recognize the procompetitive efficiencies of the 20-game rule.

A. Unlike The NCAA, The NBA Is A Professional Sports League In Which Economic Integration And Competitive Balance Are Essential To The Creation Of The League's Product

The NCAA is composed of many independent leagues and schools. As this Court noted, they could act jointly to define the game of amateur college football, but the need for joint action went no further than that. *NCAA*, 468 U.S. at 120. Thus, although this Court agreed that "*maintaining a competitive balance ... is legitimate and important*," *id.* at 117 (emphasis added), the NCAA's restrictions on telecasting games did not serve that purpose. There was no need, and no attempt, to make Yale the competitive equal of Notre Dame. As this Court observed, "The NCAA does not claim that its television plan has equalized or is intended to equalize competition *within any one league*. The plan is nationwide in scope and *there is no single league or tournament in which all college football teams compete*." *Id.* at 117-18 (emphasis added) (footnotes omitted). That expresses precisely the distinction between a cartel and a professional sports league where it *is* "legitimate and important" to maintain competitive balance. And it is that distinction the Seventh Circuit ignored.

There are 27 teams in the NBA, and the district court found that 20 of those teams would have lost money but for the equal division of the television revenues from NBA-licensed games. App. 23a. To the extent that individual teams can sell the national rights to their games at the expense of the others, competitive balance is lessened and will ultimately be destroyed. The weaker teams, especially those in poorer markets, will be unable to pay the salaries top players command, leading to a diminished ability to attract fans and television viewers. The result of the Seventh Circuit's decision could easily be an NBA with many fewer teams,

a loss of fan interest, many fewer games, many fewer cities with NBA teams, and many fewer viewers of televised games.[4]

Because competitive balance is essential to the product they sell, the NBA and all other professional sports leagues are entirely different from the NCAA. The NBA was formed as a commercial joint venture for the purpose of producing, marketing, and exhibiting high-quality professional basketball games and selling a host of derivative products, such as television rights. None of its teams would have any existence or economic significance apart from their membership in the league, and all teams pursue the production, marketing, and sale of NBA basketball through closely coordinated joint action.[5]

The NBA's teams are "not true competitors, nor can they be." *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d

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[4] The panel stated that a competitive balance argument had been made in *NCAA* and failed, so, "Unless the Supreme Court is prepared to modify *NCAA*, the district court did not commit clear error in ... rejecting the NBA's arguments." App. 16a. This was simply the court's error in applying *NCAA* to a professional sports league: Justice Stevens' opinion rejected the NCAA's competitive balance argument precisely because its members, unlike the teams in the NBA, were *not* in a single league or tournament. *NCAA*, 468 U.S. at 117-18. Far from requiring modification, this crucial distinction, upon which *NCAA* rests, supports the legality of restrictions, like the 20-game rule, that serve the NBA's critical need to maintain competitive balance.

[5] Thus, despite its ultimate ruling, the district court made findings that distinguish *NCAA* and support the legality of the NBA's rule: "The NBA is not simply a rule-making organization. It has an economic significance of its own and controls some competition between the teams off the court as well as on it. In several areas, the league has virtually preempted economic activity by the individual teams. In marketing, for instance, the merger of the teams into the league is almost complete.... In substantial measure, the league acts as an integrated firm." App. 21a-22a. "[T]he network contracts with NBC and TNT show the teams acting together as a single economic unit, pooling resources, agreeing not to compete with each other or the league and sharing the risks and benefits of their joint endeavors." App. 23a.

1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Instead, the teams are "joint venturers who produce a product ... which competes with other sports and other forms of entertainment in the entertainment market." *NFL v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).[6] As the Department of Justice joint venture guidelines recognize, "joint ventures typically achieve integrative efficiencies...." United States Department of Justice, *Antitrust Enforcement Guidelines for International Operations* § 3.4 (1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109 (1989).[7] In jointly producing, marketing, and selling national television rights, the NBA is a procompetitive joint venture, not a cartel formed to suppress competition between the teams.[8]

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[6] This Court has recognized that a "partnership[ ] or other joint arrangement[ ] in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit ... is regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356 (1982).

[7] "Joint ventures may be created for a variety of good business reasons. For example, joint ventures may be created to take advantage of complementary skills or economies of scale in production, marketing, or R&D, or to spread risk." *Id.*

[8] This Court, of course, is not bound by the Seventh Circuit's statement that the characterization of a group as a joint venture or a cartel is a finding of fact to be reviewed on a clearly erroneous standard. Indeed, the court of appeals amply demonstrated why such a characterization is not remotely an issue of fact. That court referred to characterization as a "creative" process, said the prevalence of sharing devices in league sports "may suggest the shakiness" of the cartel characterization since the teams must cooperate to have any product to sell, and said that the issue of characterization of professional sports leagues was difficult and had "divided courts and scholars for some years...." App. 8a, 15a. Courts and scholars do not usually divide over questions of fact. The facts concerning the joint operations and economic integration of NBA teams (as found by the district court and set forth in the Joint Stipulations of Fact, expressly adopted by the district court) have never been in dispute. What is in dispute is not a question

(continued...)

When there is economic integration, either horizontal, as in a joint venture, or vertical, as in a distribution system, the law regards the restraints on competition that make the integration more effective not as a naked cartel agreement but as ancillary. Such restraints are typically upheld after full Rule of Reason analysis.[9] The Seventh Circuit's abbreviated analysis of the

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[8](...continued)
of fact but the legal principle to be applied to the facts. The questions presented by this petition are entirely legal issues.

[9] *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (concerted refusal to deal ancillary to joint wholesaling venture not per se illegal); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (price-fixing agreement among independent composers ancillary to blanket license not per se illegal), *on remand*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981) (upheld on remand); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (manufacturer's division of dealers' territories not per se illegal), *on remand*, 461 F. Supp. 1046 (N.D. Cal. 1978), *aff'd*, 694 F.2d 1132 (9th Cir. 1982) (upheld on remand); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir.), *cert. denied*, 479 U.S. 1033 (1987) (restrictions on competition of joint venturers lawful); *Three Way Corp. v. ICC*, 792 F.2d 232 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 985 (1986) (ICC correct that restrictions on joint venturers do not "unduly restrain competition"); *National Bancard Corp. v. Visa U.S.A., Inc.* 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (agreement fixing interchange fee between credit card issuing banks and merchant-signing banks held lawful); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981), *cert denied*, 455 U.S. 921 (1982) (covenant not to compete following sale of business, although reducing output, enforced as lawful ancillary restraint that protected covenantee's legitimate property interests); *Dunafon v. Delaware McDonald's Corp.*, 691 F. Supp. 1232 (W.D. Mo. 1988) (restriction in shopping mall lease barring competitors of tenant lawful). *See also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) ("covenants in partial restraint of trade are generally upheld as valid when they are agreements . . . by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm"); Robert H. Bork, *The Antitrust Paradox* 263-67 (1978); Robert H. Bork, *The Rule of*
(continued...)

20-game rule, distorted by its improper characterization of the league's marketing arrangements as a cartel agreement, mistakenly dismissed all the efficiencies -- including the maintenance of competitive balance, the prevention of free-riding, and the promotion of exclusivity in the league's television licenses -- created by the NBA's restrictions on individual teams' national telecasting.

B. The Seventh Circuit's Damaging And Erroneous Ruling Cannot Be Confined To The 20-Game Rule And Places The Basic Operations Of All Professional Sports Leagues In Jeopardy

Since the court below, mistakenly applying *NCAA* to an integrated sports league, called the NBA a cartel in the sale of its output, the decision means not only that the 20-game rule is unlawful but also that any limit on the number of games individual teams may telecast nationally is illegal. The NBA's same-night rule is also in peril. But rules about national telecasting are not the only joint activities of the league threatened by the decision below. The league also markets and sells (or licenses others to sell) more than $1 billion of consumer goods annually, including home videos, such as the Michael Jordan highlight video titled "Come Fly With Me," apparel bearing league and team logos and trademarks, and other items. App. 21a-22a. Individual teams are excluded from these markets. The revenues from such sales and

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"(...continued)

Reason and the Per Se Concept: Price Fixing and Market Division, 75 Yale L.J. 373, 391 (1966) ("proper doctrine should hold ancillary horizontal price fixing and market division lawful in all cases in which the parties lack market control, and . . . all vertical market division and price fixing should be lawful regardless of the parties' market size"); Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Sec. Antitrust L. Proc. 211, 233 (1959) ("Viewing the league as a joint venture results in making lawful as reasonably ancillary to the joint venture all agreements between the members which do no more than eliminate business competition among themselves").

licenses are also divided equally among the member teams in order to preserve competitive balance and to prevent free-riding.

Because the Seventh Circuit's rationale allows no inhibitions on the commercial activities of individual NBA teams, the destruction of efficiencies the Seventh Circuit has mandated cannot easily be limited even to these areas. If, as the court held, *NCAA* requires that the NBA be viewed as 27 independent teams that may not restrict each other's commercial activities, it would violate the Sherman Act for the NBA to prevent the Bulls from playing in some rival league or from scheduling an extra 10 games during the season against the Lakers or Celtics. These extreme results follow directly from the Seventh Circuit's wholly inappropriate application of *NCAA* to a professional sports league.

The industry whose future is at stake in this case is large. Major League Baseball, the National Football League, and the NBA in the aggregate sell or license others to sell $4.5 billion of trademarked goods annually; for the four-year period ending in 1993, television rights fees for these leagues alone will total more than $6 billion. Collectively, sports leagues are the single largest supplier of programming on television, with audiences for single events in the tens of millions, and sometimes more. Every year, advertisers spend approximately $4 billion to reach that audience.

This Court has never stated how antitrust should deal with the restraints that are inherent in all professional league sports. The resulting lack of clarity has produced seemingly endless litigation on that subject in the lower courts. Over the past 25 years the federal district and circuit courts have rendered more than 65 separate and frequently conflicting decisions applying Section 1 of the Sherman Act to rules enacted by professional sports leagues that regulate economic competition among their members.[10] Nine

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[10] These cases are gathered in the Appendix at 74a.

federal circuit courts of appeals have confronted the issue, with substantial disparities in approach.

Ten years ago the Chief Justice believed that the appropriate treatment of professional sports leagues under the Sherman Act was a subject this Court should address. *NFL v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari). In light of the Seventh Circuit's decision, the NBA submits that this Court should now make it clear that the rule of *NCAA* applies to independent economic units and that professional league sports, like other joint ventures, require, and are permitted, reasonable restrictions on economic competition among member teams. Otherwise, no professional sports league will be able to maintain competitive balance, prevent free-riding, or compete efficiently as a genuine business unit in a variety of interbrand markets; all will lose member teams, and many may be unable to survive.

II. The Seventh Circuit Erred In Holding That The Sherman Act Does Not Permit The Adoption Of Ancillary Restraints To Prevent Free-Riding And May Outlaw Any Attempt To Limit Free-Riding

The Seventh Circuit held that a joint venture, here the NBA, cannot adopt a restraint to prevent free-riding if it is possible to charge the free rider a fee. App. 14a-15a. The court then went on to suggest that it may even be illegal to cope with free-riding by any means. App. 15a-16a. Both the holding and the suggestion represent a clear repudiation of principles that have been fixed since this Court's decision 15 years ago in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 728-31 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984).

We will examine, first, the proposition that a restraint is illegal where a tax is possible, then the proposition that both restraints and

taxes are illegal. The law shows both propositions to be wrong. Economic reality shows both to be calamitous.

1. The Seventh Circuit announced, as if it were stating the obvious, that "When payment is possible, free-riding is not a problem because the 'ride' is not free," App. 14a, but one searches the opinion in vain for the citation of a single case rejecting a free-riding defense on the ground that the beneficiary of the "ride" could be made to pay.

The Seventh Circuit's new rule requiring charges for free-riding is not merely unfounded, it will also spawn a host of adverse consequences. It will make business planning more difficult and costly; it will require businesses to continuously monitor the level of free-riding and attempt to value and tax it, thus adding more unnecessary expense; and it will create many new grounds for controversy and litigation: Is a tax possible; if it is possible, is it feasible in the circumstances; if it is feasible, how is the value of the services or promotion that the free-rider diverts to be determined; is the determination reasonable; how are disputes about its reasonableness to be resolved; how is the existence and the extent of the free-riding to be policed; how are disputes about its extent to be resolved? After the tax has been determined and levied, it will be obvious that its attendant costs, inefficiencies, and uncertainties would have made an outright prohibition on free-riding the most efficient restraint in the first place. That is why, when a restraint is designed to enhance the efficiency of a joint venture, the choice of the restraint should be left to the parties rather than to courts.

2. The Seventh Circuit's new tax rule finds no support in logic or policy. As the Seventh Circuit itself noted, "by selecting the tax carefully" a joint venture can reduce the amount of free-riding to any level it chooses, including to zero. App. 15a. But there obviously is no principled distinction to be drawn between an outright ban on free-riding and a tax that leads to the same result.

Perhaps it was a recognition that it was articulating a distinction without a difference that led the panel to go still further and say it might also be unlawful to levy a tax or fee to eliminate the free ride. App. 15a. This means that there may be *no* lawful means of dealing with the free-ride problem. In fact, that is the only logical inference from that court's recognition that a tax and the restraint it ruled illegal would have identical results. The effect of that conclusion on economic efficiency and consumer welfare is obvious and disastrous.[11]

The law of this Court and of all circuits that have decided this issue but the Seventh contradicts the rule that a restraint is illegal when a tax is possible and the alternative rule that both restraints and taxes are illegal.

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), demonstrates both that eliminating free-riding is lawful and that a restraint may be used even if a fee or tax would be possible. The Court there held that vertical market division of dealers' territories could be justified as a means of preventing free-riding. Yet it is clear that the manufacturer could have devised a system of fee payments between dealers. The *Sylvania* decision cannot be distinguished on the ground that this Court simply did not think of the solution the Seventh Circuit has now come up with, because

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[11] Law firms, as we have noted, are joint ventures since their members could practice separately but choose to practice jointly to gain efficiencies of specialization, sharing of knowledge and skills, and the like. Such firms invariably prohibit members from taking clients for their individual accounts rather than for the firm. Members cannot appropriate for their individual benefit the reputation and expertise that the firm has helped them achieve, nor can they use for themselves assets, such as the law library, that the firm has paid for. In that way, the focus of the individual's thoughts, efforts, and skills is the firm and the firm provides more effective representation. The only distinction between this ancillary restraint and the restraint the Seventh Circuit has ruled illegal is that, unlike the members of a law firm, NBA teams are incapable of operating independent of the venture as a whole.

profit-pass-over systems have long been known in antitrust law. Indeed, this Court expressly recognized that the "*restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used*," *Sylvania*, 433 U.S. at 58 n.29 (emphasis added), but still remanded the case to the Ninth Circuit for a full Rule of Reason analysis. The Seventh Circuit's approach was completely the opposite and deprived the NBA of the Rule of Reason analysis *Sylvania* requires.

Not only did the court below contradict *Sylvania*, it produced an irreconcilable conflict with every other circuit to consider the issue. For example, in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987), Atlas could have imposed a system of charges on its carrier agents to compensate Atlas for the agents' use of Atlas equipment, training, and the like, *see id.* at 212-13, but did not. Instead, it banned free-riding altogether, and the restraint was upheld notwithstanding the possibility of a charge. The same holding -- inconsistent with the Seventh Circuit's here -- uniformly has been adopted whenever the issue has arisen.[12]

Not only did the court below ignore *Sylvania* and create a conflict, but it also misapplied the Rule of Reason by failing to recognize that the NBA had satisfied its burden of articulating a valid procompetitive justification for the 20-game rule: The Seventh Circuit *accepted* the NBA's contention that there were three forms of free-riding that the 20-game rule was designed to,

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[12] *See, e.g., Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. Unit A Jul. 1981); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132 (9th Cir. 1982); *Westman Commission Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988).

and did, ameliorate. App. 13a-15a. There was, accordingly, no quarrel that a genuine free-riding problem existed. Nor was there any question that the 20-game rule had the effect of mitigating the problem. Even under the abbreviated version of the Rule of Reason applied in *NCAA* and *Indiana Federation of Dentists*, 476 U.S. 447 (1986), the NBA had thus advanced a valid basis for its rule and the burden should have shifted back to plaintiffs to prove that the NBA had market power and that, on balance, the 20-game rule was anticompetitive. The Seventh Circuit, however, never explained why ameliorating a genuine free-riding problem was not an adequate procompetitive justification, why taxes were the only potentially acceptable procompetitive solution, or why, as the court suggested, there may even be *no* solution permitted by the Sherman Act.

The Seventh Circuit's new rules about free-riding and ancillary restraints are contrary both to sound policy and the overwhelming weight of authority in this Court and in other circuits. They will throw business planning into turmoil, create fertile new ground for litigation, and decrease consumer welfare by undermining the ability of all firms to control free-riding. This Court should intervene now to forestall these results.

III. The Seventh Circuit Erred In Rejecting The NBA's Exclusivity Justification

The Seventh Circuit held that the NBA, as a lawful joint venture, could not prohibit its member teams from licensing national telecasts of NBA games, a prohibition that served the purpose of permitting the league, as a unit, to enter into exclusive national television licenses. That holding strikes down exclusive licenses in the television industry when the licensor is a partnership or joint venture.

In rejecting the NBA's exclusivity justification, the Seventh Circuit's error was to assume that market definition was to be accorded no role in assessing whether exclusive licensing practices

could be procompetitive. The NBA had asserted that it competed in the broad market for nationally televised sports and entertainment, and that in that market exclusive television licenses were necessary if the league was to offer a competitive product, a marketplace fact admitted by plaintiffs and deemed true by authorities such as the Federal Communications Commission, the D.C. Circuit, and others, including the Seventh Circuit itself (App. 10a):

> all [suppliers of entertainment programming] — right down to the smallest producers of syndicated programs — find it in their interest to sell exclusive rights....

Exclusivity in licensing leads to consumer benefits because it stimulates demand among advertisers for spots on the programming (because an advertiser may deliver its message without dilution from a rival who, absent the licensee's exclusivity, could place ads on the same program on a different network), and allows the network to promote the program knowing that its efforts will not benefit other carriers who might free-ride on them. Vigorous promotion stimulates consumer interest, increasing demand for the programming overall. The increased demand, in turn, leads ultimately to the creation and carriage of more programming, an increase in output that benefits consumers.

Relying on *NCAA*, the Seventh Circuit held this argument to be insufficient as a matter of law. It is that reliance that represents a critical error: In *NCAA*, the lower courts had found that college football was a product market unto itself, facing no competition from other programming. If it *had* faced competition, this Court said the result might well have been different (*NCAA*, 468 U.S. at 115 & n.56):

> Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its non-existent competitors.

> If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete.

That is precisely the argument the NBA made: That exclusive television licenses are procompetitive where the licensor faces interbrand competition, as the NBA asserted it did. But because neither the district court nor the Seventh Circuit made any attempt to define a relevant market or determine whether the NBA possessed market power, there was no basis under *NCAA* or any other authority for the Seventh Circuit to reject the NBA's exclusivity justification.

The Seventh Circuit's holding that exclusive licensing is anticompetitive, despite its dicta to the contrary, cannot be limited on any principled basis. Any joint venture or partnership that creates television programming, and that prohibits its members from licensing the venture's shows so that the venture as a unit may enter into exclusive licenses, is now at risk. Consumer benefits cannot be shown because the Seventh Circuit's opinion rules out as a matter of law any assertion that exclusive licensing is procompetitive. As a result, all exclusive licensing practices -- the preferred form of license in the television industry -- are now subject to summary condemnation where the licensor is a joint venture or partnership.

This ruling creates a conflict because the Seventh Circuit is the first court to hold that exclusive television licenses are not procompetitive. The Federal Communications Commission, for example, has held that exclusive television licenses are of "critical importance ... as a competitive strategy or tool.... [A]ll commenters agree that the ability to enter into exclusive contracts is a widely used competitive tool that is important to program suppliers, cable operators, and broadcasters." *In re Amendment of Parts 73 & 76 of the Commission's Rules Relating to Program Exclusivity in the Cable & Broadcast Indus.*, 3 FCC Rcd 5299,

5308-09, ¶¶ 49, 60 (1988), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). This holding was affirmed by the D.C. Circuit, which stated that "all stations, broadcast and cable, want exclusivity.... [E]xclusivity [is] a valuable commodity, and conversely ... lack of exclusivity diminishes the value of a program." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1179-80 (D.C. Cir. 1989).[13]

The Seventh Circuit's holding, at odds with all other authorities, creates confusion in the law and places in immediate jeopardy exclusive licensing practices that years of litigation, as well as administrative review by the FCC, have established as beneficial to competition.

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[13] Other circuit and district courts have reached the same conclusion. *See Association of Indep. Television Stations, Inc. v. College Football Ass'n*, 637 F. Supp. 1289, 1304 (W.D. Okla. 1986) ("Exclusive licenses in the television industry have commonly been found to advance competition"); *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Serv.*, 616 F. Supp. 502, 510 (D.N.J. 1985) ("The ability to present a unique product in the ... broadcast media contributes to the value of a ... television station and enhances its competitive edge in the market place"), *aff'd without opinion*, 791 F.2d 924 (3d Cir. 1986); *Ralph C. Wilson Indus. v. American Broadcasting Cos.* 598 F. Supp. 694, 706 (N.D. Cal. 1984) ("exclusive licenses ... promote competition by maximizing the number of available programs and preventing audience fragmentation for a program.... maximizing the program's value and avoiding overexposure, which can shorten the program's useful life.... add[ing] to the uniqueness of each station's viewer identity.... permit[ting] each station to plan programming to compete with another station's programming.... providing an incentive to maximize the number of programs offered and by maximizing the supplier's revenues from the licenses"), *aff'd sub nom. Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.*, 794 F.2d 1359 (9th Cir. 1986).

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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September 2, 1992

APPENDIX

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 91-1434

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Plaintiffs-Appellees,

v.

NATIONAL BASKETBALL ASSOCIATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 6247—**Hubert L. Will**, *Judge.*

ARGUED OCTOBER 17, 1991—DECIDED APRIL 14, 1992

Before BAUER, *Chief Judge*, and CUDAHY and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* WGN-TV, channel 9 in Chicago, is called a superstation because cable systems throughout the nation carry its signal. During the 1990-91 season WGN telecast 25 games of the Chicago Bulls, one of 27 teams in the National Basketball Association. During the 1991-92 season WGN will telecast 30 of the Bulls' regular-season games. This is a boon to fans, for, apart from the seven contests broadcast on network TV, the remainder of the Bulls' 82 regular-season games appear

on SportsChannel, which is available only on cable. It is a boon as well to the Bulls' owners, who collect larger royalties from WGN than from SportsChannel, in light of WGN's greater audience. But it is a bane to the other clubs, which would prefer to have fans watch their contests rather than tune in the Bulls, who, thanks to Michael Jordan and Scottie Pippen (to name only the Olympians), are the winningest and most popular team in the NBA.

Owners decided that only networks holding authority from the league may telecast nationally. The NBA sold to the National Broadcasting Company the right to broadcast 26 regular-season games; it sold 50 to Turner Network Television, a cable network. NBC gets first dibs. Clubs may telecast 41 games per season over the air to their home markets and put the other 41 on local cable, keeping the proceeds. No team may broadcast a game in competition with NBC, and superstations encounter two additional limits: they may carry no more than 20 games and may not telecast in competition with TNT. The cap, adopted in 1990 over the dissent of the Bulls and the New Jersey Nets, sparked this suit under the Sherman Act, 15 U.S.C. §1. The Bulls and WGN characterize the NBA as a cartel that has slapped a limit on the output of broadcast games, something that is illegal under the antitrust laws. The NBA replies that it is a joint venture and that all broadcasting rules are lawful ancillary restraints. Both sides seek comfort in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). Seven weeks after the complaint was filed, the district judge held a five-day trial and promptly enjoined the NBA from enforcing the 20-game limit. 754 F. Supp. 1336 (N.D. Ill. 1991). The district court's extensive opinion describes both the NBA's rules and the operation of superstations; we refrain from duplication. Challenges to some of the NBA's other broadcasting rules remain for decision in the district court. We confine our attention to the 20-game restriction.

I

Antitrust injury is one subject in particular that has not been presented for decision here. In the district court the NBA argued that the Bulls and WGN have not established that they suffer antitrust injury. The district court disagreed, 754 F. Supp. at 1352-55, and the NBA has dropped the point. Some of the district court's discussion suggests that the NBA confused antitrust injury with avoidable injury; the district court replied that the plaintiffs' ability to restructure their transactions to avoid some of the effects of the 20-game rule is neither here nor there for purposes of the antitrust injury doctrine.

Injury in fact establishes standing under Article III of the Constitution. Without question the Bulls and WGN suffer injury in fact. Antitrust injury is a different beast. The antitrust laws throttle some cooperative behavior of producers to preserve the benefits of competition for consumers. Producers often complain about the efforts of business rivals, which reduce their profits. E.g., *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986). Judicial relief from the real injuries caused by rivalry would harm the consumers the antitrust laws are supposed to protect. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991). The antitrust injury doctrine of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987); *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986).

Whenever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing. The Bulls and WGN are producers. Their natural desire is higher prices and protection from competition. It may be that WGN in its role as purchaser of sports contests is a good proxy for the ultimate consumers—who are, depending on one's perspective, either the persons who watch the games on TV or the advertisers who "buy viewers" from TV stations as an input into promotion of other products. We assume that this subject will be explored further in the proceedings yet to come.

II

As a basketball league, the NBA claims the protection of the Sports Broadcasting Act, 15 U.S.C. §1291:

> The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sport[ ] of . . . basketball . . . by which any league of clubs . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.

In reply the district court observed that the statute speaks of "transfers" by "any league of clubs". What the NBA has done is *forbid* transfers, not make transfers; the league has regulated the activities of individual clubs, to which the Act does not apply. Accordingly the district court held that the statute does not exempt the NBA's rules from the antitrust laws. 754 F. Supp. at 1349-52.

No line between transfers made and transfers forbidden could be stable; they are two sides of the same thing. Property is a mixture of rights to use and to exclude others from using. Any transfer of broadcast rights entails exclusion of the competing uses of the same rights. Suppose the NBA sells to NBC the right to show all or any selection of its games, or carves the broadcast rights into thirds and parcels the rights among networks. See

United States Football League v. National Football League, 842 F.2d 1335, 1353-55 (2d Cir. 1988). Each grant to a network will be exclusive; what the network owns, a team cannot show separately (without the network's permission). Otherwise the league has little it can sell collectively. The Bulls acknowledge this by conceding that they may not sell to WGN a right to broadcast games that NBC has selected.

Unless the Act allows the league to bar broadcasting of at least some games, it is hard to see why it is cast as an exemption from the antitrust laws. Only a reduction in output allows producers to raise price. If the league arranges for the broadcast of every game (or if the clubs may broadcast every game the league does not), there is no reduction in output. To have any (antitrust) effect at all, the Act must allow the league to keep some games off the air. The statute allows the transfer of "all or any part of" the rights in the games; "part of" implies fewer than all. Even professional football, the sport with the most extensive broadcasting program, blacks out some home games. We therefore disagree with the district court to the extent it thought that the Sports Broadcasting Act applies only when the league arranges for (or permits) telecasting of every contest.

Still, the Sports Broadcasting Act applies only when the league has "transferred" a right to "sponsored telecasting". Neither the NBA's contract with NBC nor its contract with Turner Network Television transfers to the network a right to limit the broadcasting of other contests. Both contracts and, so far as we can tell, the league's articles and bylaws, reserve to the individual clubs the full copyright interest in all games that the league has not sold to the networks. As the "league of clubs" has not transferred to the networks either the right to show, or the right to black out, any additional games, the Sports Broadcasting Act does not protect its 20-game rule.

The NBA protests that such an approach is arbitrary. What if the league had assumed control of all broadcast

rights and licensed only 20 of the Bulls' games to WGN? That would have been a "transfer" by a "league of clubs." What could be the point of forbidding a different mechanism (the rule limiting to 20 the number of games teams may sell to superstations) that leads to the same result? Other mechanisms to achieve similar outcomes abound. The league might have put a cap of 20 superstation games in its contracts with NBC and Turner, or it might have followed the path of professional baseball and allowed unlimited broadcasting over superstations while claiming a portion of the revenues for distribution among the clubs. (Sharing of revenues occurs in all team sports, although less so in the NBA than other leagues. See 754 F. Supp. at 1339-45.)

Whether there are ways to achieve the NBA's objective is not the question. Laws often treat similar things differently. One has only to think of tax law, where small differences in the form of a business reorganization have large consequences for taxation. Substance then follows form. *Howell v. United States*, 775 F.2d 887 (7th Cir. 1985). Antitrust law is no exception: agreements among business rivals to fix prices are unlawful *per se*, although a merger of the same firms, even more effective in eliminating competition among them, might be approved with little ado. Cf. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990). Such distinctions are not invariably formal. The combined business entity might achieve efficiencies unavailable to the cartelists. But then the line in the Sports Broadcasting Act is not entirely formal either. Perhaps the reason the NBA has not commandeered all of the telecasting rights and sold limited numbers of games to superstations is that it cannot obtain the approval of the clubs to do this—for a change in the allocation of rights is apt to affect the allocation of revenues, making the bargaining problem difficult with 27 clubs. A league's difficulty in rearranging its affairs to obtain the protection of the Sports Broadcasting Act is one source of protection for competition.

What the NBA might have done, it did not do. The Sports Broadcasting Act is special interest legislation, a

single-industry exception to a law designed for the protection of the public. When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. Special interest laws do not have "spirits," and it is inappropriate to extend them to achieve more of the objective the lobbyists wanted. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2676 (1990); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986); *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow. Compromises draw unprincipled lines between situations that strike an outside observer as all but identical. The limitation is part of the price of the victory achieved, a concession to opponents who might have been able to delay or block a bill even slightly more favorable to the proponents. Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades. E.g., *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *National Broiler Marketing Association v. United States*, 436 U.S. 816, 827-29 (1978).

III

The merits of the case turn on the characterization of the NBA. Is a sports league a single entity? In that event its decisions about telecasting are effectively unreviewable. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). True, its operating divisions (the teams) have separate owners, but on this view the league's method of hiring capital is no more relevant than would be the decision of a single firm to obtain loans from different banks in different cities, or the decision by a large retailer to compensate managers of its stores with a percentage of the local profits. Cf. *Rothery Storage & Van Co. v. Atlas*

Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986). Is the NBA instead a joint venture adopting strategies that foster its competition with other entertainments? In that event pro basketball on TV is not fundamentally different from *Star Trek: The Next Generation*, a series created by cooperation among many persons who are competitors at other times. Producers of a television series commit the episodes exclusively to one network (or one station in a local market) in order to compete against the offerings of other ventures. No program, indeed no producer's entire menu of programs, commands a substantial share of the market in televised entertainment. Marketing strategies such as exclusivity and limits on the number of episodes produced per year then must be understood as ways to compete rather than ways to exploit consumers. Perhaps, however, the NBA is a joint venture only in the production of games; in the hiring of inputs (from basketballs to players) and in the sale of their product, the owners are competitors. In that event the television rules look more like a reduction in output, the work of a cartel, and only an exemption from the antitrust laws permits the owners to act cooperatively.

Characterization is a creative rather than exact endeavor. Appellate review is accordingly deferential. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457-61 (1990); *NCAA*, 468 U.S. at 104-20; *Mucha v. King*, 792 F.2d 602, 605-06 (7th Cir. 1986); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428-29 (7th Cir. 1985). The district court held a trial, heard the evidence, and concluded that the best characterization of the NBA is the third we have mentioned: a joint venture in the production of games but more like a cartel in the sale of its output. Whether this is the best characterization of professional sports is a subject that has divided courts and scholars for some years, making it hard to characterize the district judge's choice as clear error.

Parts of the NBA's brief verge on the argument that a sports league is a single entity as a matter of law. Justice Rehnquist's opinion dissenting from the denial of cer-

tiorari in *National Football League v. North American Soccer League*, 459 U.S. 1074 (1982), supports such a position, to which *Copperweld* added weight two years later. There is a lively debate in the academic press on the subject. See Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 Ind. L.J. 25, 26-27 (1991) (collecting cases and commentaries pro and con). All agree that cooperation off the field is essential to produce intense rivalry on it—rivalry that is essential to the sport's attractiveness in a struggle with other sports, and other entertainments in general, for audience. The persons denominated owners of teams may not own them in an economic sense. Many of their actions are subject to review by the league's board, so that the "owners" may be no more than financier-managers of the league's branch offices. How much cooperation at the league level is beneficial is an interesting question in economics as well as law. See Jesse W. Markham & Paul V. Teplitz, *Baseball Economics and Public Policy* (1981). But the NBA did not contend in the district court that the NBA is a single entity, let alone that it is a single entity as a matter of law. It does no more than allude to the possibility here. Whether a sports league is a single entity for antitrust purposes has significance far beyond this case, and it would be imprudent to decide the question after such cursory dialog. Perhaps the parties will join issue more fully in the proceedings still to come in the district court. For now we treat the NBA as a joint venture, just as the parties do in the bulk of their arguments.

If the NBA is a joint venture, then the Rule of Reason supplies the framework for antitrust analysis, as the district court properly held. 754 F. Supp. at 1357-58. *NCAA* leaves no room for debate. 468 U.S. at 98-104. Here the NBA concentrates its fire, for the district court condemned the 20-game limit without finding that the NBA has a significant share of a particular market. 754 F. Supp. at 1362-64. The league reminds us that "[t]he first step in any Rule of Reason case is an assessment of market power."

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 191 (7th Cir. 1985). See also *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir. 1989); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 265 (7th Cir. 1984); *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 202, 204 & n.26 (7th Cir. 1979).

As the NBA points out, sports is a small fraction of all entertainment on TV, and basketball a small fraction of sports televising. Viewers of basketball games do not have qualities uniquely attractive to advertisers—and if they do, the advertisers can reach them via other sports programs and many other programs too. NBC advertises basketball games during sitcoms and other programs, implying that the market in viewers extends well beyond weekend sports programming. Higher prices, the hallmark of a reduction in output, are missing: advertisers pay no more per thousand viewers of NBA basketball than they do for other sports audiences, and substantially less than they pay per thousand viewers of other entertainment. During 1990 the cost per thousand viewers (CPM) of a regular-season NBA network game was $8.17. NCAA football fetched $11.50, and viewers of prime-time programs were substantially more expensive. The CPM for *L.A. Law* was $19.34, the CPM for *Coach* $13.40. The NBA hardly has cornered the market on the viewers advertisers want to reach.

According to the NBA, this means that its rules do not injure viewers or advertisers, and it makes more sense to understand them as ways to compete against other suppliers of entertainment programming, all of which—right down to the smallest producers of syndicated programs—find it in their interest to sell exclusive rights to a small number of episodes. The NBA contends that until it tried to adopt a rational structure for television it had a much smaller audience than it does now. During 1980 and 1981 CBS carried the final game of the championship series by delayed broadcast! In 1982 only five NBA games appeared on network TV. A "restraint" that in the end ex-

pands output serves the interests of consumers and should be applauded rather than condemned. Rules keeping some popular games off superstations may help weaker teams attract the support of their local audiences, something that (like the sharing of revenues) in the longer run promotes exciting, competitive games. Teams in smaller markets depend more on live gate to finance operations that will compete with the Bulls, Lakers, and Knicks on the court. Rivalry makes for a more attractive product, which then attracts a larger audience—the very expansion of output that the antitrust laws foster.

A market defined by TV viewers is not the only way to look at things. The district court in *NCAA* defined a market of games shown. If "basketball games" are the product, then the NBA's plan cuts output by definition even if more persons watch the fewer (and more attractive) games shown on TV. The NCAA tried to persuade the Supreme Court that the plaintiffs should be required to establish power in a viewership market. The Court replied: "We must reject this argument for two reasons, one legal, one factual. As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. . . . This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 109-10 (footnotes omitted). Although this passage is not entirely clear, see Diane P. Wood, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 Sup. Ct. Rev. 69, 111-12, we understand it as holding that any agreement to reduce output measured by the number of televised games requires some justification—some explanation connecting the practice to consumers' benefits—before the court attempts an analysis of market power. Unless there are sound justifications, the court condemns the practice without ado, using the "quick look" version of the Rule of Reason advocated by Professor Areeda and by the Solicitor General's brief in *NCAA*. See 468 U.S. at 109-11 nn. 39, 42; Phillip E. Areeda, 7 *Antitrust Law* ¶1508 (1986).

The district court proceeded in this fashion, examining the league's justifications; finding each wanting, the judge enjoined the 20-game rule without defining a market. In this court, the league's leadoff justification is that the telecasting rule prevents the clubs from "misappropriating" a "property" right that belongs to the NBA: the right to exploit its symbols and success. The district court properly rejected this argument on two grounds. First, it mischaracterizes the NBA's articles and bylaws, which leave with the teams the intellectual property in their games. The NBA could acquire a property interest in all broadcasting rights but has not done so. The 20-game rule does not transfer any broadcasting rights to the league; instead it shortens the list of stations to which clubs may sell rights the teams concededly possess. Second, it has nothing to do with antitrust law. We want to know the effects of the TV policy on consumers' welfare, not whether the league possesses sufficient contractual rights that it has become the "owner" of the copyright. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52-53 & n.21 (1977) (rejecting an argument that legality of restraints under the antitrust laws depends on the characterization of a transaction in the law of property). A cartel could not insulate its agreement from the Sherman Act by giving certain producers contractual rights to sell to specified customers. Agreements limiting to whom, and how much, a firm may sell are the defining characteristics of cartels and may not be invoked as *justifications* of a cutback in output. That the NBA's cutback is only five games per year is irrelevant; long ago the Court rejected the invitation to inquire into the "reasonableness" of price and output decisions. E.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Competition in markets, not judges, sets price and output. A court applying the Rule of Reason asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is "reasonably small." (What is more, if five superstation games is tiny in relation to the volume of telecasting, the benefits from the limitation are correspondingly small.)

Only the NBA's contention that its TV policy controls free-riding deserves serious analysis. It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive. This makes investments in design and distribution of products less attractive, to the ultimate detriment of consumers. Control of free-riding is accordingly an accepted justification for cooperation. E.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *GTE Sylvania; Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989).

Three forms of free-riding characterize the Bulls' telecasting, according to the NBA. First, the contracts with NBC and TNT require these networks to advertise NBA basketball on other shows; the Bulls and WGN receive the benefit of this promotion without paying the cost. Second, the NBA has revenue-sharing devices and a draft to prop up the weaker teams. The Bulls took advantage of these while they were weak (and through the draft obtained their current stars) but, according to the league, are siphoning viewers (and thus revenues) to their own telecasts, thus diminishing the pot available for distribution to today's weaker teams. Third, the Bulls and WGN are taking a free ride on the benefits of the cooperative efforts during the 1980s to build up professional basketball as a rival to baseball and football—efforts that bore fruit just as the Bulls produced a championship team, and which the Bulls would undermine.

Free-riding is the diversion of value from a business rival's efforts without payment. Consider the classic example of free-riding in retail distribution, introduced to antitrust analysis by Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960). Manufacturer produces a product or improvement that requires explanation or demonstration—perhaps a television

set with an improved degaussing coil. Retailer #1 demonstrates the effects to consumers in a showroom filled with TV sets, some with and some without the feature. Such a demonstration is costly in merchandise, in staff time, in floor space. Neither Manufacturer nor Retailer #1 can charge the consumer for this information. Its value is too uncertain to expect the consumer to pay for access to the sales floor, and a retailer is not apt to gain customers by threatening to charge them if they leave without buying. So a consumer may leave the store with valuable information; Retailer #1 recovers the cost of supplying this information in the purchase price of the product, not with a separate charge. Yet a consumer armed with the information may order the product from Retailer #2, which offers no information. Retailer #2 can make a profit at a lower price than does Retailer #1, for Retailer #2 has lower costs. To compete, Retailer #1 must lower its own price, and that means lowering its costs too—cutting cost by cutting services that consumers value. Restrictions on the price, territory, or customers of Retailer #2 may restore the profitability of point-of-sale services, to consumers' benefit.

What gives this the name *free*-riding is the lack of charge. Retailer #1 does not charge the customer for a valuable service; Retailer #2 does not pay Retailer #1 for delivering this service. Put the retailers in a contractual relation, however, and they could adjust their accounts so that the person providing a valuable service gets paid. When payment is possible, free-riding is not a problem because the "ride" is not free. Here lies the flaw in the NBA's story. It may (and does) charge members for value delivered. As the NBA itself emphasizes, there are substantial revenue transfers, propping up the weaker clubs in order to promote vigorous competition on the court. Without skipping a beat the NBA may change these payments to charge for the Bulls' ride. If the $40 million of advertising time that NBC will provide during the four years of its current contract also promotes WGN's games, then the league may levy a charge for each game shown on a

superstation, or require the club to surrender a portion of its revenues. Major league baseball does exactly this and otherwise allows its teams access to superstations. 754 F. Supp. at 1343. Avoidance of free-riding therefore does not justify the NBA's 20-game limit.

Doubtless there is irony in saying that the limit violates the antitrust laws *because* the defendants could adopt a system of charges for making sales. Revenue-pooling and pass-over payments are the usual tools of cartels. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), modified and affirmed, 175 U.S. 211 (1899), describing the elaborate system of charges employed by a cartel during the final years such institutions operated openly. Charges for the privilege of putting games on superstations will lead to fewer such broadcasts; by selecting the tax carefully, the NBA could induce the Bulls to broadcast 20 games, neither more nor less, on WGN. Plaintiffs have hinted that they will ask the district court to ban all revenue-sharing procedures for telecasting. Yet we do not suppose that the Bulls are going to ask the court to hold that the draft of college players, the cap on their payroll, the distribution of revenues from the NBC and TNT contracts, and other sharing devices all violate the Sherman Act. Sharing is endemic in league sports. The prevalence of what is otherwise a hallmark of a cartel may suggest the shakiness of treating the clubs, which must cooperate to have any product to sell, as rival "producers" in the first place.

Because of the way in which issues have become separated in this litigation, we do not decide whether revenue-sharing from superstation broadcasts is consistent with the antitrust laws. Needless to say, we also do not decide whether any of the cooperative arrangements by which the league hires the services of the players comports with the Sherman Act. (The National Basketball Players Association, concerned that we might do some such thing by accident, has filed a brief urging us to guard our tongues.) It is enough to say that if the league may levy a tax on superstation broadcasts, then there is no free-riding. And

if the league may not levy a tax, then a direct limit with the same effect as a tax is unjustifiable. Either way the NBA comes up short, and under *NCAA* the failure of its justifications eliminates the need for the district judge to define a market.

The NCAA argued that restrictions on the number of games telecast spread revenues and exposure among universities, helping to produce balanced competition on the field and hence making the games actually telecast more exciting, to the benefit of fans. Distributing telecasts among schools served, in the NCAA's view, as a substitute for the draft and other controls professional leagues deployed to the same end. The Supreme Court found the argument unpersuasive. It is hard to see how similar balance arguments by professional leagues, which make the most of drafts, trades, and revenue-pooling to foster exciting games, could be more compelling. Unless the Supreme Court is prepared to modify *NCAA*, the district court did not commit clear error in applying the "quick look" version of the Rule of Reason and rejecting the NBA's arguments.

IV

We are conscious that this case went to decision like greased lightning. Seven weeks from complaint to trial is unheard of in antitrust litigation. Explanations of problematic conduct take time to develop and more time to test. A conclusion, which the district judge reached, that the NBA had not developed *and proved* a powerful pro-consumer explanation for its rules is no surprise. Understanding novel practices may require years of study and debate. If litigation ought not resemble a marathon, neither is the 100-yard dash a good model. When the defendant bears the burden of explanation and demonstration, then ignorance leads straight to condemnation. Yet ignorance about effects is as consistent with benefits to consumers as with injury—and when the defendants lack market power, the effects are apt to be beneficial to consumers (neutral at worst), so ignorance ought not imply

problems. As ignorance about the effects of business practices is regrettably plentiful, many beneficial practices are at risk.

Markets slowly but surely undermine practices that injure consumers. Competition does not undermine judicial decisions, so the costs of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one. If the NBA had protested the haste with which this case was tried, we would have been inclined to question whether it was prudent to issue a final, rather than a preliminary, injunction so quickly. Yet although the NBA's briefs in this court grumble about the breathless pace of the litigation, the league did not protest the schedule and did not ask the district court to issue a preliminary injunction and reserve final decision until it could collect additional evidence. Even now the NBA does not inform us that it has additional evidence bearing on this issue. It may be that developments during the impending trial on the NBA's other rules will cast new light on the 20-game rule. As things stand, however, the league has supplied no adequate reason for us to disturb the judgment.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring.

I agree fully with the result reached by the majority opinion and the imaginative and penetrating analysis on which it rests. I would, however, withhold judgment as to some of the more sweeping dicta on the singularity of focus of the antitrust laws on readily demonstrable consumer benefit. *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-38 (7th Cir. 1986); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In addition, it may be that "[m]arkets slowly but surely undermine practices that injure consumers." Slip op. at 17. But theory may far outrun practice in assertions such as this.

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Plaintiffs,

— v. —

NATIONAL BASKETBALL ASSOCIATION,

Defendants.

No. 90 C 6247

Judge Hubert L. Will

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

The National Basketball Association ("NBA"), acting through its Board of Governors, limits the number of games NBA teams may broadcast over "superstations." Superstations are independent, over-the-air television stations that broadcast in their local market areas and are also carried by cable systems to other parts of the country. WTBS in Atlanta, WGN TV in Chicago and WWOR in New York are all examples of superstations. The NBA's rules, including those limiting games on superstations, of which there have been several over the years, are enacted by vote of the NBA's Board of Governors, a body consisting of one representative from each of the 27 NBA teams.

During each of the last five seasons, the NBA's superstation rules allowed every NBA team to broadcast up to 25 games on a superstation. But effective this season, the Board of Governors has adopted a new rule reducing that number from 25 to 20. Chicago Professional Sports Limited Partnership, owners of Chicago's NBA franchise, the Chicago Bulls, and WGN Continental Broadcasting

Co. ("WGN"), to whom the partnership ("the Bulls") had licensed 25 Bulls games for this season, seek to enjoin the league from enforcing the new 20-game rule so that the Bulls may sell and WGN may buy rights to televise 25 rather than only 20 Bulls games for broadcast nationwide.

This is an antitrust case. The Bulls and WGN allege that the league's decision to reduce the number of superstation games permitted to any team constitutes a horizontal agreement among the NBA teams to restrict output and to boycott superstations, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

Having heard evidence and arguments over the course of five days and read the pleadings, the briefs, the relevant exhibits and designated deposition testimony submitted by the parties, we now enter our opinion, incorporating our findings of fact and conclusions of law as required by Fed. R. Civ. P. 52. The parties have submitted a joint stipulation of undisputed facts, which should be considered findings of the Court, though some of those facts may not expressly appear in this opinion.[1]

This opinion is divided into fifteen parts. Parts I through VII discuss the structure of the NBA, the history of the NBA's television policies as well its current policies, the logistics of superstations, WGN's contract with the Bulls and television coverage of Bulls games in Chicago and nationwide. Parts VIII through XIII summarize the contentions of the parties and address each of those contentions on the merits. Parts XIV and XV contain concluding remarks.

For the reasons set out in this opinion, judgment will be entered for plaintiffs, the Bulls and WGN. The NBA's five-game

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[1] Several of the factual findings in the opinion are followed by source citations to the record. These citations have been abbreviated as follows: "Tr." marks a citation to the trial transcript; "PX," "DX," and "JX" refer to plaintiffs', defendant's and joint trial exhibits; "SF" is a citation to the parties' joint list of undisputed, stipulated facts; "Dep." refers to deposition testimony by a witness who did not appear live at trial.

reduction in the number of superstation telecasts allowed to each team, from 25 to 20, is an unreasonable restraint of trade. A separate order recording the judgment and a permanent injunction, restraining the NBA from enforcing its present 20-game restriction on superstation broadcasts, will be entered.

I

The NBA is a joint venture of its 27 professional basketball teams, based in cities and television markets as large as New York, Los Angeles and Chicago and as comparatively small as Charlotte, North Carolina and Salt Lake City, Utah. As joint venturers the teams have understandably entered into agreements about how many players are allowed on the basketball court, how high the basket should be, how many seconds should run on the shot clock and the like. Obviously, agreements on game rules are essential to producing basketball games at all. But the teams have also entered into league-wide agreements on a great many other subjects, including collective bargaining with the players, the college draft, group insurance, the licensing of products, and television contracts with the national networks. Those agreements are not strictly necessary to produce basketball games. The NBA is not simply a rule-making organization. It has an economic significance of its own and controls some competition between the teams off the court as well as on it.

In several areas, the league has virtually preempted economic activity by the individual teams. In marketing, for instance, the merger of the teams into the league is almost complete. It is undisputed that the league controls the trademarks and logos of all the teams and that, outside their own arenas, the teams have few if any rights to license the sale of merchandise -- jackets or pennants or posters -- with team or NBA logos. Through licensing agreements with the league's marketing arm, NBA Properties, Inc., each team has granted the league the sole and exclusive worldwide right, subject only to narrow exceptions, to license and use its "symbols." Several other facts are also undisputed: each team has granted all rights in the film footage of its games to NBA

Properties, and no team may produce and sell a home video involving NBA basketball to the public, except as permitted by the NBA. Highlight videos of the Bulls superstar Michael Jordan, the Mikhail Baryshnikov of basketball, are, for example, licensed by the NBA not the Bulls. As a final example, in 1990, when Lee Auto Parts in Chicago wanted to run a sweepstakes promotion using Bulls tickets as prizes, the Bulls were required to submit their agreement with Lee to the league office for advance approval. SF 69, 70, 87, 103-105.

In substantial measure, the league acts as an integrated firm. Revenues generated from contracts for licensed products entered into by the league are split evenly among the teams, and the even split is redistributive. Not all teams contribute equally to sales. Last year, Bulls paraphernalia outsold every other team's products. SF 81. Notwithstanding, the Bulls receive the same 1/27th draw of the net as all the other teams.

The teams also pool and market some of their television rights jointly, through the league, under an exemption from the antitrust laws granted by Congress. *See* 15 U.S.C. §§ 1291-1295 (the "Sports Broadcasting Act"). For this season and the next three seasons, the NBA has sold broadcast rights, on behalf of all the teams, both to the National Broadcasting Company ("NBC") and Turner Network Television ("TNT"), a cable network. Revenues from those contracts will be shared jointly and the share to each team from the combined rights fees received from NBC and TNT this season will come to $6.8 million. SF 388; Tr. at 1079.

These fees from NBC and TNT represent the single largest source of shared revenues among the teams, and their agreement to pool certain TV rights, sell them jointly, and split the proceeds evenly reflects a kind of nonaggression pact among all the teams, an agreement not to compete in an area where they otherwise might. In a free open market, with each team doing its own bargaining, strong teams like the Bulls, the Detroit Pistons, the Los Angeles Lakers and the Boston Celtics would command more money this season than weaker teams like the Sacramento Kings or the Miami Heat. Under their agreement to pool TV broadcast

rights, however, each team will receive the same amount. Whether the strongest teams could negotiate on their own for as much money as their pro rata share of what the league has obtained for them by pooling their rights is an open question.

The income of all the teams is significantly enhanced by the revenues from their joint projects. Combining the revenues from all their joint projects, broadcast and other, each team will receive nearly $8.5 million from the league this season as shared profits of their joint venture. For many teams the revenues from the shared ventures may mean the difference between operating in the black and net operating losses. The NBA Commissioner, David Stern, estimated that but for the $8.5 million they will receive from the league, 20 of the 27 teams would run net operating losses this season. Stern also testified that, even with the shared revenues, one or two teams might still finish the season in the red. Tr. at 917, 1076.

It is not disputed, and it is plain from the financial figures, that the prosperity of the league currently depends on the volume of the shared revenues generated by the league's economic activity on behalf of the teams and particularly on the revenues generated by the broadcast contracts with the national networks. As has been mentioned already, of the $8.5 million the league will distribute to each team this season, $6.8 million or 80% is attributable to revenues from national television contracts negotiated by the league.

Nevertheless, and despite the substantial economic collaboration among the teams, the NBA is only a partially integrated venture. The level of contractual integration among the teams lies somewhere in between what would be tolerated under the antitrust laws among wholly separate firms, on the one hand, and what one would expect from a fully merged or integrated firm on the other. Joint enterprises like NBA Properties, Inc. and the network contracts with NBC and TNT show the teams acting together as a single economic unit, pooling resources, agreeing not to compete with each other or the league and sharing the risks and benefits of their joint endeavors. But the teams also remain very

much separate entities, each one with economic significance in its own right.

Head-to-head direct competition in the marketplace is clearest in New York and Los Angeles. The New Jersey Nets compete against the New York Knicks and the Los Angeles Lakers compete against the Los Angeles Clippers in the same geographic market. All the teams compete for media attention, for coaching staffs and front office personnel and, with some restraints, for players.

The most significant sign of their economic independence is the fact that all the teams calculate their own profits and that what they earn on their own and keep for themselves is more substantial than what they produce together and share. In four of the last five years, from the 1985-86 season through 1989-90, the average NBA team collected slightly better than 50% of its total revenues from a single source, gate receipts for regular season home games. In the fifth season, 87-88, the proportion was 49.1%. JX 47. Only minuscule amounts of those revenues are shared. This season, each team will keep 94% of its regular season home gate, giving up only 6% to the league. SF 63. The teams earn more independently than they receive in shared revenues.

Although Commissioner Stern estimated that the $8.5 million that the league will distribute to each team this season may effectively double the gross revenues of the poorest teams, he also said that same amount would represent only 15-20% of the gross revenues of the richest teams. Tr. at 916. Last year, when the distribution from the league was much smaller, because television revenues from the league's national television contracts were less than half of what they will be this year, the proportion of its gross revenues which any team received from the league was also smaller. Shared revenues are not the primary source of income for many teams.

It is instructive, too, that fifteen to fifty percent income from revenue sharing is not the rule among professional sports leagues. Some leagues show greater economic integration than the NBA does. Thus, revenue sharing among the teams in the National

Football League ("NFL") runs much deeper than in the NBA. Of the total revenue of the 28 NFL clubs, roughly 70% flows from the league's network contracts and is shared equally. The NFL teams, unlike NBA teams, share their gate receipts 60-40 between the home team and the away team. The Commissioner of football, Paul Tagliabue, estimated that only 5-10% of an NFL team's revenues "is not shared in any way." Tagliabue dep. at 69-71.

All NBA teams depend on their own entrepreneurship and some teams do much better in the marketplace than others. The disparities among the teams' year-end financial statements are substantial. Last season, for instance, the Lakers recorded total revenues of $42.8 million dollars, which is more than three times as much as the Washington Bullets, who grossed a league low, $11.9 million. JX 47. For the 26 teams other than the Lakers, average revenues for the '89-90 season were $21 million -- almost twice as much as the Bullets grossed but not even half of what the Lakers made. JX 47.

As a general trend, these disparities in revenues have an impact on competition on the court. Teams with impressive records tend to show bigger revenues than teams in the cellar. On the very most basic level, going to the playoffs means more games, and therefore more gate receipts, and more fan following and therefore higher rights fees from local broadcasting (which belong 100% to the teams) -- in other words, more money. In 1989-90, the league champions, the Pistons, collected playoff revenues of $2.9 million dollars, net of the playoff revenues they shared with the league. JX 47. In addition, and to complete the circle, more money means a better chance at making the playoffs again. The richest teams enjoy competitive advantages on the court over the poorest teams -- in the ability to bid for free agents or to pay to keep their own players who opt for free agency, and so field a strong team; in the ability to charter flights for away games, and so field an alert team; in the ability to hire top notch staffs, and so field a well-coached team, and more.

The teams in the NBA cooperate in some ventures, but they engage in many others, on the court and off, as independent firms.

II

This season the NBA will gross more than $180 million from its network television contracts with NBC and TNT. NBC will carry 22 regular season games, TNT will carry 50 and each network will carry up to 30 playoff games. Time was, however, that the league's appeal to the networks was nowhere near what it is now. In 1981, CBS aired the NBA's premier event, its championship series, on tape delay rather than carrying it live and in prime time. League revenues from television, over-the-air and cable, were less than $23 million in 81-82, increasing to 27.5 million in 82-83, but in both cases amounting to less than 16% of the projected revenues for this season. JX 42; DX 368.

Today, the league is in full blooming financial health. Total league revenues this season are projected at $700 million. In 1982, they were $128 million. Tr. at 645. The economic resurgence of the NBA is nothing short of phenomenal, and as the league explains it, "[w]hile a number of factors have contributed to the resurgence of the League, one of the principal reasons for its current success has been a sound and consistent television policy." NBA's Proposed Findings of Fact ¶ 77, p. 52. NBA Commissioner David Stern has obviously done a superb job.

A significant strategic part of the league's television policy since 1982 has been to restrict the number of games in the market which compete with the league's national contracts. In particular, the league has taken several steps to limit local broadcasts and the independent rights of the teams to sell games, in order to maximize the value of the rights it sells to the national networks for national broadcast.

Beginning in 1979, the NBA's Board of Governors resolved that all future television contracts entered into by the teams would be made "subject to the Constitution, Bylaws and all other rules and regulations" of the league, "as they presently exist and as they may from time to time be amended," subject to "the terms of any existing or future" television contracts entered into by the league and subject to review by the Commissioner to guarantee

compliance. At the same time, the Board of Governors also adopted a resolution reserving to the league "the exclusive right to enter into contracts for the direct telecasting of NBA games by cable systems located outside the territory of all members." That resolution effectively voided a national cable contract that had been signed by the New York Knicks. The league then entered into its own national cable contract, on behalf of all the teams, with the USA Cable Network ("USA"). USA promised to pay $1.5 million in fees over three seasons, 1979-80 through 1981-82. DX 368.

The next year, 1980, the Board of Governors adopted a further resolution, limiting each team to 41 over-the-air telecasts for the upcoming 1980-81 season. Every team plays 82 regular season games, and during the 1979-80 season at least one team, the Atlanta Hawks, had televised all 82 of its games on over-the-air television. At the same meeting, the teams also empowered the Commissioner "to take all steps deemed by him necessary to ensure compliance" with the television rules they had adopted, including the authority "to direct the forfeiture" of any game broadcast in violation of those rules, "to invoke and apply all sanctions and penalties available to him under the NBA Constitution," and to impose a fine of up to $100,000 for each violation or "for any refusal by any team to comply with any directive issued by the Commissioner in the implementation or enforcement of such" television rules.

The Bulls voted for both the 41-game rule and to grant the Commissioner the authority to enforce TV resolutions. Subsequently, they also voted for the renewal of those resolutions in every year through 1985, when, again with their approval, both resolutions became standing enactments.

The 41-game rule imposes a limit on superstations but also on all other over-the-air stations. No over-the-air station or network, except under a contract from the league, may carry more than 41 regular season games. The first limitation specifically tailored to superstations came in 1982, when the league signed new cable contracts with USA and with ESPN, for the 82-83 and 83-84 seasons, giving each network the rights to 40 games each season

plus playoff games. The ESPN contract was for games on Sunday nights, while USA aired on Thursdays, and the Board of Governors quickly adopted a resolution barring the teams from televising games over superstations on either of those nights and thereby eliminated the possibility of head-to-head competition between games on superstations and the league's cable package.

In June 1985, the Board of Governors put further restraints on superstations, this time voting to limit the teams to 25 superstation games a year, beginning with the 85-86 season, down from the 41 that had been allowed in each of the previous four seasons. The Bulls voted for the resolution. In October 1989, the governors approved a permanent resolution "blacking out" superstation games on nights when an NBA game is shown nationally on cable as part of the league's national cable package, which, by this time, had moved from USA and ESPN to TNT. Most recently, in April 1990, the Board of Governors voted, over the objections of the Bulls and the New Jersey Nets to reduce superstation broadcasts by any team from 25 to 20, giving rise to this lawsuit.

The NBA's television strategy has not been mimicked by other professional sports leagues. The NBA, the NFL and Major League Baseball have each approached selling and regulating TV rights in different ways. All three leagues are currently in the first year of four-year contracts with the networks, running through their 1993 seasons, and each league read and played the market differently. Still, the networks agreed to substantial increases in rights fees for all of them.

The NFL negotiates all television rights deals for its teams and prohibits them from negotiating television contracts on their own, with the exception of contracts for certain pre-season games. The NFL's teams retain no rights and no games. SF 331. In addition, while the NBA has, since 1984, put its games on two national networks, one over-the-air and one cable, the NFL has opted to spread its coverage. This season, and through 1993, ABC is slotted to air NFL football on Monday nights. CBS will air NFC games on Sunday afternoons, while NBC airs the AFC. TNT will carry Sunday night games for the first half of the season, and

ESPN picks up Sunday night for the last half of the season. All regular season NFL games are produced for network television; every NFL game is televised every week under one of the NFL's five network contracts. There are no superstation broadcasts of NFL games.

The NFL's new contracts are its most lucrative ever and the NFL was able to negotiate the increases despite the fact that ratings for NFL games, as a percentage of total households, have declined. Tagliabue at 75.

The NBA's broadcast strategy also differs from Major League Baseball's. Baseball recently signed a contract with ESPN for 175 games a season for four seasons, in its first move ever into national cable rights and exposure. At the same time, baseball has moved to limit its over-the-air exposure. Baseball's new 1990-93 deal with CBS gives the over-the-air network only 16 regular games this season, down from 40 games last year, leaving 24 new Saturday afternoon slots open to the teams. By contrast, since 1982 the NBA has steadily reduced the size of its national cable package from 80 games to 50 and upped its over-the-air package from 7 games to a possible 26, aiming for more exposure on the major over-the-air networks and less on national cable. DX 368.

Major league baseball regulates superstation broadcasts by imposing a surcharge rather than limiting the number of games directly.

III

The NBA's television rules, as they are presently on the books, may be summarized as follows:

> Under NBA rules each team may televise up to half (41) its regular season games, home or away, over any commercial over-the-air television station other than a superstation located in its "home territory." The teams keep 100% of the revenues from these local home territory, over-the-air broadcasts. A television station falls

within a team's home territory if its "transmitters are located in the team's home state and/or in the area consisting of 150 miles from the corporate or unincorporated team city of operation," subject to some adjustments in cases where the home territories of two nearby teams overlap. SF 250. The teams are also allowed to sell over-the-air rights to a number of stations in isolated areas, remote stations outside NBA cities which have historically carried certain teams and which have been grandfathered in as exceptions to the rules.

There are very few, mostly negligible, limits on the number of games a team may televise over local cable in its "local market," meaning within a 75 mile radius of the corporate limits of the team's home city. The teams keep 100% of the revenues from these local market cablecasts.

Teams may also contract for cablecasts in an apron area up to 75 miles beyond the city-plus-75-mile-radius, but revenues from such "extended market" broadcasts are shared with the league. The league has also authorized contracts beyond the extended market, meaning contracts with regional cable systems, for which it charges a per subscriber fee.

Each team may, under the new rule, televise up to 20 games on a superstation. Superstation games count toward the tally of over-the-air games: a team that televised 20 superstation games would have 21 left to show on another local over-the-air station, not 41. Superstation games are the only nationally transmitted NBA games not controlled by the league. The teams currently keep the revenues from their contracts with the superstations. Superstation broadcasts, however, also generate royalty payments from cable operators who pay for the right to retransmit superstation games. The cable operators make these royalties payments to the Copyright Royalty Tribunal which then distributes them to copyright owners. The league receives these payments from the royalty tribunal

on behalf of the teams and distributes them evenly among the teams. In 1990, the NBA received a distribution of $3,960,345 from the Copyright Royalty Tribunal, largely though not entirely in compensation for NBA games televised on superstations, during the 1988 calendar year. SF 286.

The teams may not televise any game over-the-air, on cable, or on superstations opposite an NBC game and may not broadcast the same game carried by NBC at all, even on tape delay. The teams are not allowed to air a game on a superstation opposite a TNT game but may telecast even the same game TNT is carrying, head-to-head with TNT, on strictly local over-the-air TV or on local cable.

That exhausts the options open to the teams, individually. National network contracts, national cable contracts, and regional cable contracts are currently negotiated by the league. We turn now to those contracts.

IV

Last season marked the final year of a four-year agreement between the NBA and CBS. That agreement produced revenues last year of $47.5 million, for 16 regular season games and 26 playoff games. Last season was also the final year of a league contract with TNT. TNT carried 51 regular season games and 30 playoff games last season, for which it paid $27 million. DX 368.

This year television revenues will be a whopping 241% higher. As the result of two new four-year deals, negotiated by the Commissioner, one with NBC and one with TNT, the league will receive $180 million this year, to be divided 27 ways among the teams. The new NBC and TNT contracts are clearly coups for the Commissioner, the league and the teams.

Under the new contract, NBC will pay $601 million for exclusive over-the-air rights to up to 26 regular season games plus 30 playoff games, including the finals, over each of the next four

seasons. The network must carry at least 17 regular season games each season. It has elected to carry 22 this season. NBC also agreed to provide $40 million of on-air commercials for NBA games over the next four years, 60% of which must be shown during prime time. NBC receives first pick of NBA games, before any other TV network or station, and receives exclusive rights to the games it selects. NBC games cannot be broadcast by another television network or station. NBC is not required to carry the Bulls or any other team, but may not show any one team more than seven times a season. The Bulls, the Lakers, and the Pistons will each appear seven times this season and the Celtics six.

There were effectively no price negotiations with NBC. Before signing with NBC, the NBA had offered its package to the incumbent rights holder, CBS, for $600 million plus promotionals. CBS refused and the league then went to NBC and offered the same contract on the same terms. But CBS, pursuant to an agreement with the NBA, retained a cleverly designed variation on a right of first refusal, which worked wonderfully for the NBA. Under the terms of that agreement, if NBC or any other network came forward with a bid in an amount less than the NBA's last demand to CBS, $600 million, then CBS got another turn to bid and was guaranteed the contract so long as it matched the new offer from the second network. This arrangement was made clear to NBC and, unwilling to bid even $1 less than $600 million and thereby take the risk that the contract would go to CBS, NBC bid $1 million more and landed the contract for itself. There was no dickering.

The NBA contract appears to be a success so far for NBC, which has already sold 80% of its NBA advertising inventory this season, at about twice the rates CBS was charging last year. DX 470. Still, and despite the strength of its advertising sales, NBC plans, as indicated, to carry only 22 regular season games this season, although it bought the rights to 26 and pays the NBA no less if it broadcasts only 22.

The NBA's second new four-year contract is a renewal with TNT, which, even though its ratings for NBA games last season

were 20% lower over its universe than the ratings WTBS had scored the year before, agreed to a new four-year contract at $275 million for 50 regular season games plus 30 playoff games each year. DX 468; Tr. at 981. That is more than double, each year, what TNT had paid for the same number of games in its last contract. DX 368.

Both the NBC and the TNT contracts were signed before the league owners voted in April to reduce the number of superstation games from 25 to 20. The NBA discussed the issue of superstations with both networks but made no commitments to either network about reducing or eliminating superstation games. The Commissioner did, however, announce at a press conference following the signing of the contract with NBC that he intended to recommend to the Board of Governors that superstations be "phased out."

Major league baseball also negotiated its biggest contracts ever last year, despite the substantial number of superstation games that are televised, by the Cubs (145 games in 1991), the White Sox (45 games), the Atlanta Braves (120 games) and the New York Mets (75 games). NBA's Proposed Findings at 123, ¶ 291.

V

Under the technical definition used by the NBA, a "superstation" is "any commercial over-the-air television station whose broadcast signal is received outside of the local Designated Market Area ('DMA'), as defined by A.C. Nielsen Co., by more than 5% of the total number of cable subscribers in the United States as reported by A.C. Nielsen. . . . " SF 308. Under the NBA's definition, there are three superstations in the country right now, WGN, WTBS in Atlanta and WWOR in New York. All three carry NBA games. SF 309.

Superstations have existed for almost fifteen years and first appeared following passage of Section 111 of the Copyright Act of 1976, 17 U.S.C. § 111. Section 111 allows cable operators to retransmit copyrighted programming from any over-the-air stations

across the country to their subscribers under a "compulsory license." The crux is the compulsory license. Because of it a cable company in California can legally transmit copyrighted programming broadcast over WGN without WGN's permission and without infringing the copyrights to the programming, so long as the cable company contributes a royalty fee to the Copyright Royalty Tribunal fixed by statute. See generally, *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393 (8th Cir. 1985) (discussing section 111, the significance of the compulsory license and the rights of broadcasters and copyright owners); *Eastern Microwave, Inc. v. Doubleday Sports*, 691 F.2d 125 (2d Cir. 1982) (same); 17 U.S.C. § 111 and 37 C.F.R. 308.2 (1990) (setting royalty rates); *Cablevision Systems Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1988) (discussing the royalty schedules).

The trick, following the enactment of section 111 in 1976, was to figure out how to get broadcast signals from the stations that were generating them to the cable operators and to encourage the birth of a secondary market of intermediate carriers capable of doing it. Ted Turner in Atlanta figured all this out early on, and in December 1976, he arranged for Southern Satellite Systems, Inc. to pick up the signal from WTBS in Atlanta; beam it up from Atlanta to a satellite transponder and then beam it back down from the satellite to cable operators across the country for retransmission. See *Hubbard Broadcasting, supra*, 777 F.2d 393. WTBS thus became the first major superstation.

WGN became a superstation in 1978, when United Video began plucking its over-the-air signal off the air and retransmitting it. Under the copyright laws, this did not require WGN's permission, and WGN received and receives no payments from United Video for the right to retransmit its signal, though WGN does receive royalty payments from United Video's customers, cable system operators, in the form of royalty payments for the retransmission of programming to which it owns the copyrights.

Since 1985, WGN has provided United Video with a direct microwave link-up, so that United Video currently transmits a

signal which it receives from WGN over a microwave feed rather than plucking it from the air. In general, it transmits the microwave signal exclusively. Except during periods when there is a problem with reception over the microwave, United Video does not usually use WGN's over-the-air signal for retransmission. Initially, the primary idea behind the microwave feed, and its appeal to United Video, was to improve the quality of the signal that was retransmitted, though also to guarantee two signals, so that there would always be a backup if there were temporary problems with reception on one signal or the other. The microwave feed, however, also offers WGN and United Video other advantages, though WGN, in particular, does not fully exploit these.

The microwave provides WGN with two signals, which would enable the station to send out one signal over-the-air, locally in Chicago, and another over the microwave. By thus "splitting its feed," WGN could double its available inventory for advertisers and increase its revenues -- by selling Chicago advertisers over-the-air time, selling national advertisers time on the microwave, and sending out both signals simultaneously but to different audiences, the over-the-air signal to Chicagoans, and the microwave signal to cable subscribers nationwide via United Video and the cable operators. Ted Turner does this all day long on WTBS. He sells two sets of 30-second spots for most programming -- one, at local rates, for over-the-air broadcast to Atlanta viewers and one, at national rates, to cable viewers across the country, thereby taking advantage of WTBS' national penetration and maximizing revenues. WGN, however, does not split its feed during most hours of the day and does not split it at all during Bulls broadcasts. It does split its feed for its telecasts of the Chicago Cubs and, for Cubs games, offers advertisers three choices -- over-the-air Chicago only, national cable only or both.

Beginning in January 1990, the microwave feed became significant for a new reason. Effective January 1, 1990, the FCC re-enacted rules which give local broadcast stations the right to purchase exclusive rights to syndicated programming and forbid

cable operators from importing the same programming into their broadcast markets. See 47 C.F.R. §§ 76.151 - 76.163. See also *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir.1989) (upholding the FCC rules). These "Syndex" rules, as they are called, give a local broadcaster in Des Moines the right to buy exclusive rights, for example, to *Cheers* episodes in syndication and then prevent cable operators from sending *Cheers* in syndication into his local market area on WGN. The local broadcaster in Des Moines can force the cable company to "black out" *Cheers*.

The Syndex rules presented a problem for cable operators and intermediate carriers like United Video, and the microwave feed solved that problem. The question was how to substitute alternate programming on WGN's signal, when *Cheers* or some other Syndex blacked out show was running on WGN, so that WGN could still be carried, and carried black-out free, 24 hours a day in Des Moines. The microwave provided the answer. By agreement with United Video, WGN "covers over" *Cheers* and other syndicated, blacked-out programming on the microwave feed. In place of *Cheers*, WGN supplies substitute programming. In this way, the substitute programming rather than *Cheers* is sent over the microwave to United Video and then retransmitted in Des Moines and everywhere else WGN is received by satellite. (There is apparently no convenient way to cover over *Cheers* only in Des Moines but still send it everywhere else). WGN is paid by united Video for handling Syndex program substitutions and for other services but not for United Video's carriage of WGN's signal.

Technically, WGN could cover over its Bulls broadcasts on the microwave to United Video the same way it covers over *Cheers*, so that its Bulls games would go out over-the-air only. At that point, Bulls games on WGN would be available to a national audience only if United Video abandoned the microwave feed and switched back to picking up WGN's signal directly off the air so as not to miss the Bulls. Whether United Video would do that is unclear.

VI

From 1985-86 through 1988-89, Bulls games were occasionally shown in Chicago on CBS under the league's national contract but otherwise were carried in Chicago on two stations -- the over-the-air Chicago affiliate for the Fox network, WFLD Channel 32, and also, for some of that period, on SportsChannel Chicago, a local cable company. The Bulls' multi-year deal with WFLD granted WFLD rights through the 1991-92 season and would have allowed WFLD to broadcast up to 41 games in Chicago this season. The Bulls and WFLD, however, terminated their contract in September 1989, and the Bulls moved the team to WGN Channel 9.

After terminating with WFLD but before signing with WGN, the Bulls also talked with a third independent over-the-air station in the Chicago area, WPWR Channel 50. WPWR offered the Bulls $3.8 million plus a percentage of net advertising revenues for the rights to 40 games for the 1989-90 season. DX 172, 377; Tr. at 546-547. The Bulls rejected that offer.

The contract the Bulls signed with WGN grants the station exclusive rights to 25 games for two years, 1989-90 and 1990-91, with an irrevocable option exercisable by either party to extend the agreement through 1993-94. WGN was interested in buying more games. Pursuant to the league's previous 25-game limit on superstations, however, the Bulls only offered 25.

The entirety of the Bulls-WGN contract was, as the league rules require, expressly made "subject to the terms of any existing or future" NBA television rules. The contract contains a walk-away provision. In the event that league rules, during the term of the contract, are amended to bar the Bulls from giving WGN at least 21 games, "due to [WGN's] status as a superstation," either party has the option of terminating the agreement, unilaterally. The contract also covers other contingencies. If, instead of limiting the number of games, the league levies a superstation fee, as Major League Baseball now

does, the agreement provides for WGN to pay half of any assessment and also gives the Bulls a right to terminate.

Rights fees under the contract are calculated from "net advertising revenues." WGN promises to pay the Bulls 59% of "net advertising revenues" for the games, with a guaranteed minimum payment of $61,000 per game.

As a result of their move to WGN, the Bulls' gross revenues from local broadcasts doubled. In 1989-90, the first year of its contract with the Bulls, WGN aired 25 games for which it paid the Bulls $3.2 million or an average of $128,000 a game. The year before, 1988-89, WFLD had carried 37 Bulls games and paid the Bulls $1.6 million, or an average of $43,000 per game.

Ratings in the Chicago area have also soared. On WGN, Bulls broadcasts during 1989-90 scored, on average, a 10.2 rating in Chicago, which translates to 320,000 viewing households per game. By contrast, ratings on WFLD the year before had been in the 5's, corresponding to roughly 150,000 households, less than half the viewership pulled by WGN. The Bulls were a strong team both seasons. In 1988-89, the Bulls won 47 games and lost 35. In 1989-90, their record was 55 and 27. They sold out all their home games both years.

The improvement in the Bulls' ratings from WFLD to WGN is not readily explained by anything but differences between the two stations, differences which may include the strong, longstanding association between WGN and Chicago sports in the minds of Chicagoans; the fact that WGN (Channel 9) is a VHF station while WFLD (Channel 32) is UHF, giving WGN a lower channel position, which stations covet; and the extensive promotion WGN gives Bulls games on the air during prime time.

WGN is currently the only over-the-air television station in Chicago licensed by any Chicago-area professional sports team. The station owns the exclusive over-the-air telecast rights to the Cubs, the White Sox and the Bulls. The Bears, Chicago's NFL franchise, are not allowed under NFL rules to market their rights

independently, and the Black Hawks, Chicago's National Hockey League franchise, do not broadcast over-the-air.

VII

WGN's ratings and stature in Chicago reflect only half of its impact in the market. Because its signal is transmitted by United Video to cable subscribers across the country, WGN is widely available outside Chicago. Programming on WGN reaches 34% of all television households nationwide, more than 30 million homes, and twenty-eight of those thirty-million-plus homes belong to cable subscribers outside of Chicago. Put differently, 31% percent of the nation's television households outside of Chicago both have cable and can watch Bulls games on WGN. These figures reflect "penetration," the number of potential viewers. The number of viewers outside Chicago who actually watch Bulls games on WGN, WGN's "delivery" in other words, is significantly lower. On average, during the 1989-90 season, 450,000 cable households outside Chicago tuned in to each Bulls game shown on WGN. SF 326. During the second half of the 89-90 season, after the reenactment of the FCC's Syndex rules, viewership was substantially lower. From January 1990 forward, average viewership outside of Chicago for a Bulls game on WGN was 336,000. PX 1004. Dennis FitzSimons, WGN's vice president and general manager, indicated that 50 percent of the viewing households outside Chicago, for a Bulls game, are in cities that do not have NBA teams. Tr. at 146.

Adding the 336,000 viewing households outside Chicago that watch Bulls, post-syndex, to the 320,000 Chicago viewers who tuned in for each game, results in total viewership for any Bulls game on WGN of, on average, fewer than 700,000 households. For some games with particularly strong match ups the numbers are higher. CBS, by contrast, drew roughly 4.7 million viewers a game for its Sunday afternoon NBA broadcasts last season. TNT's delivery, at between 750,000 and 800,000 households for each of its NBA games, was comparable to, though still slightly larger, than WGN'S. DX 503, 509; Tr. at 146.

There is no question that WGN profits from its national coverage of the Bulls. Its sales staff stresses the national coverage to advertisers, referring to it as the station's "bonus circulation advantage" or "rate advantage." Determining just how much WGN profits from carrying the Bulls nationally -- in other words, what allocable share of the revenues WGN derives from Bulls broadcasts should be attributed to the premium it can charge because of its audience outside Chicago -- is understandably difficult. Dennis FitzSimons estimated that being a superstation with a national audience enabled the station to gross perhaps 15% more than it otherwise could in revenues. Tr. at 281.

WGN is not the only superstation that will broadcast NBA games this season. WTBS, which penetrates more than 54 million households nationwide, is scheduled to carry 20 games for the Atlanta Hawks. WWOR, which reaches 13 million households, with about half of those outside of the local New York market, will carry 6 games for the Nets. WTBS and WWOR are not parties to this lawsuit. WWOR is unaffected by the 5-game reduction, given its plans to carry only 6 games. WTBS may have waived any right to sue. WTBS is owned by Turner Broadcasting System, Inc. ("TBS"), and TBS, by a letter agreement with the NBA, and in order to induce the NBA to enter its national contract with TNT, which is also owned by TBS (as are the Hawks), agreed that it would support, comply with and not challenge any reduction by the NBA in the number of superstation games, up to 5 a season, provided that any such reduction would apply equally to all superstations.

VIII

With or without the 20-game restriction on superstation games, all 82 of the Bulls regular season games are scheduled to be televised in Chicago this season in some way or another. NBC has selected 7 Bulls games, TNT has selected another 10, WGN is scheduled to show 20, and SportsChannel Chicago is set to carry 55, 10 of which are duplicates of games on TNT. The games on TNT and SportsChannel Chicago are available only to households

that have cable television. Slightly less than half the households in Chicago are wired for cable.

IX

We turn now to the contentions of the parties. The Bulls and WGN contend that the Board of Governors' resolution reducing the permissible number of superstation games from 25 to 20 constitutes both an unlawful horizontal agreement among the teams to restrict output and a group boycott of superstations, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. The Bulls and WGN seek an injunction. 15 U.S.C. § 26.

The NBA's position is, first, that the 5-game reduction is protected from Sherman Act challenges by the antitrust exemption for professional sports leagues created by the Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295; second, that the 5-game reduction has no significant, if any, restraining effect on trade; third, that even assuming the reduction represents a restraint on trade, it is not an unreasonable one; and fourth, that neither the Bulls nor WGN are proper plaintiffs.

The threshold issue in the case concerns the NBA's immunity, or lack of it, under the antitrust laws. The NBA has not argued that it is a single entity and therefore altogether immune from Section 1 attacks, instead limiting its argument to a contention that its superstation rules are exempt from Sherman Act attack by virtue of the Sports Broadcasting Act (the "SBA"), enacted in 1961.

The SBA provides, in section 1291, that the antitrust laws shall not apply to:

> any joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the right of such league's member clubs in the sponsored telecasting of . . . games. . . .

15 U.S.C. § 1291. The parties agree that Bulls games on WGN qualify as "sponsored telecasting." WGN receives no money from cable subscriptions and relies on advertising sales for 98% of its revenues. But by its terms, the SBA only protects rights in sponsored telecasting that have been transferred or sold *by a league*. The exemption created by the statute does not cover this case.

The Bulls, not the NBA, both owned and licensed the rights to the five games that were transferred to WGN and which the 5-game reduction would eliminate. This was not a sale or transfer by "any league of clubs" but rather by the Bulls themselves, though subject to league approval, and the antitrust laws therefore apply. The SBA is not ambiguous on that point. It says transfers *by a league* and does not require deep interpretation. The NBA has propounded four lines of argument to show why the SBA does apply, but none of them defeat the clear wording of the statute.

1. The NBA's arguments that the rights sold to WGN were transferred by the league rather than the Bulls are unpersuasive. WGN bought a license from the Bulls to televise 25 Bulls games, and the Bulls, as holder of the copyrights conveyed by that license, effected the transfer and retain the revenues from it, with the exception of the small amounts which the cable operators pay to the Copyright Royalty Tribunal and are shared by all the teams in the league. The NBA did not own the copyrights to the 25 Bulls games at issue here and could not transfer them.

The league had limited authority to block the transfer. The 27 teams in the league have agreed among themselves to refrain from contracting except on terms consistent with the NBA's bylaws and constitution and consented to have the Commissioner police their agreement. But nothing in that agreement nor anything else in the constitution or bylaws suggests any further agreement by the teams to share their separately owned copyrights and transfer those rights, in whole or part, to the league. The Bulls do not hold their copyright rights to the 25 games they licensed to WGN as if in joint tenancy with the league. Were the Bulls to leave the league or be expelled for contracting with WGN on terms contrary to the

league's constitution or bylaws, the league would not be left with part ownership of the Bulls' copyright for the 25 WGN or any other Bulls' games but with nothing.

Arguably, the Bulls own the copyright to any given game jointly with the team they happen to be playing. But either of two joint owners of a work may grant a non-exclusive license to the work to a third party without permission of the other, subject only to a duty to render an accounting for a rateable share of the profits. 1 M. Nimmer, *Nimmer on Copyright*, §§ 6.10 - 6.12 (1990). No team has complained about the fact that the Bulls gave WGN exclusive over-the-air rights in the Chicago market or, directly, that the Bulls have not shared their profits. All NBA teams, save the Knicks, have similar over-the-air contracts in their local markets.

2. The Bulls, as well as all the other teams, have ceded some copyrights to the league -- but not to all games or even for all national broadcasts. As a result of the league's contract with NBC, no team, neither the Bulls nor any other, has the right to license the telecasting of any of the 22 games NBC plans to carry this season. The teams have ceded their rights *in those games* to the league, and the league, as owner of the rights to those games, licensed them to NBC. The Bulls could not have sold WGN rights to their Christmas day 1990 match up with the Pistons, as that game had been sold by the league and was carried by NBC. But neither the Bulls nor any other team has lost its copyright to games which have not been sold by the league.

Neither the constitution, the bylaws nor any other league document provides that the teams shall hand over to the league, outright, their copyrights to every game. Nor is there any document or contract providing that although ownership of the copyrights shall remain with the teams, only the league may license telecasts, whether national telecasts or any other kind. The silence is conspicuous. The teams *have* each signed licensing agreements granting the league exclusive rights to license their trademarks and other "symbols."

Section 1291 of the SBA exempts joint agreements among the teams to "transfer" rights, including the agreement to transfer 17 to 26 games to NBC during each of the next four seasons. But it does not, by its terms, similarly protect joint agreements "to prohibit the transfer" of national broadcast rights over and above those licensed to NBC (or possibly to TNT, assuming that TNT's broadcasts fit within the statutory meaning of "sponsored telecasting"). Games not sold by the league to NBC (or to TNT) remain the property of the teams.

3. The SBA is clearly worded. It says transfers by a league. Because the games sold to WGN were owned and transferred by the Bulls rather than the league, the SBA does not, by its terms, cover this case. Under some circumstances, however, that would not be dispositive.

By its terms, section 1 of the Sherman Act literally prohibits "every" contract, combination or conspiracy in restraint of trade. But ever since *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), Section 1 has been read as outlawing only "unreasonable" restraints. Reading Section 1 literally would be nonsensical. It cannot mean what it says or it would outlaw every contract.

The NBA argues, in essence, that reading the SBA literally would be nonsensical:

> If the plaintiffs' challenge to the 20-Game Rule were to succeed, it would mean that although a league could "transfer" a package of "pooled rights," a league could not take the steps necessary to protect those rights and preserve their value. The key to the value of the NBA's pooled rights is exclusivity. . . . The Bulls' challenge to the 20-Game Rule would eviscerate the SBA by destroying a sports league's ability to transfer meaningful national market broadcast rights. Thus, the 20-Game Rule must be protected under the SBA if the "transfer" the SBA specifically authorizes is to take place.

NBA's Pretrial Brief at 18-19.

The SBA, in the form enacted by Congress, may or may not be the best version possible, but it is not nonsensical, even read literally. The immediate impetus for passage was a 1961 court decision voiding a contract between the NFL and CBS as inconsistent with a consent decree that had been entered eight years before and was binding upon the NFL. *See United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961) (voiding the CBS-NFL Contract); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) (judgment against the NFL, resulting in a consent decree). By that 1961 contract, the NFL had awarded CBS the exclusive broadcast rights to all NFL games. The contract specified that CBS would televise every team's away games back into its home city, with the result that every single NFL game would be carried on television. The 1961 decision invalidated that contract. The immediate effect of the SBA was to establish that the CBS contract was lawful and to overrule the 1961 decision.

If the NBA were to transfer rights in all of its games and guarantee that all of them would be televised, which is what the NFL did in 1961 and continues to do today, the transfer would be protected by the SBA and immune from antitrust attack by the Bulls, WGN or anybody else. But the NBA has not transferred rights to all its games. The Bulls and the other teams still own and control the rights to the games not included in the league's contracts with NBC and TNT, and therein lies the NBA's vulnerability to this lawsuit. To this, the NBA responds that the purpose of the SBA was not to compel all leagues to behave like the NFL, that if section 1291 only protects broadcast arrangements like the NFL'S, and leagues with as much appeal to the networks as the NFL, then it provides next to no exemption at all. That result, the NBA urges, could not have been Congress' intent.

The words of the statute do not reveal much about Congress' intent, or lack of it, to protect leagues such as the NBA, which make package sales of fewer than all their games, from antitrust challenges. The statute does say that the SBA only protects

transfers by a league, which the transfer to WGN clearly was not. Moreover, it says that unambiguously, making a search for deeper intent unnecessary. In addition, the result of reading 1291 to mean what it says is not so nonsensical as to compel changing its wording by judicial edict.

The statute does not protect agreements by a league to transfer "or prohibit the transfer" of rights. It only protects "transfers." The result of that wording is to shelter leagues such as the NFL, which sells 100% of its games to the networks, from antitrust attack but to leave the NBA, which sells less than 10% of its games to the networks, open to Sherman Act attacks to the extent that the NBA attempts to prevent its teams from transferring rights to the remaining 90% of its games, thereby making them available to viewers across the country. That result, whether intended or not, is not nonsensical, and arguments that the SBA should have been written more broadly should be addressed to the Congress not the federal courts.

4. The NBA makes one final argument about the SBA. Section 1291 allows a league to pool the totality of all its teams' television rights. Witness the NFL. Surely, says the NBA, if it allows that it must allow the NBA's less restr[illegible]ive approach, which at least leaves the teams some rights. For it cannot be the case, says the NBA, that the Sherman Act condemns a practice which allows for more competition than the lawful minimum. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). This argument frames the issue incorrectly. The question is not what the antitrust laws allow but what the SBA permits. The purpose of the SBA, as opposed to the purpose of the Sherman Act itself, was not to promote competition. It was to establish the legality of a practice which tends to restrain competition, package sales to the networks. Whether the SBA protects the NFL but does not protect the NBA, or possibly baseball or hockey, does not depend on how much competition for broadcasting those leagues permit but simply which practice or practices Congress meant to exempt. Antitrust exemptions are to be construed narrowly with minimal compromise to the antitrust laws. *Group Life & Health*

Insurance v. Royal Drug Co., 440 U.S. 205, 231 (1979). The joint agreement by the teams to prohibit any one of them from transferring more than 20 games to a superstation is obviously not the same thing as a joint agreement effecting such a transfer. The antitrust laws therefore apply.

X

Since the Sports Broadcasting Act does not bar WGN and the Bulls from attacking the legality of the NBA's decision to cut back on superstation games, the next question is whether they have standing to do so. Plaintiffs seeking an injunction under section 16 of the Clayton Act must establish both standing and "antitrust injury." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). The extent to which these two requirements overlap may be debated. The essential point is that both must be met and that together they require plaintiffs to prove the following: (1) that they have suffered or been threatened with loss or damage, in other words, an injury; (2) that the defendant's alleged violation of the antitrust laws was a proximate cause of their injury; (3) that the injury, more than being simply "an injury causally linked" to an antitrust violation, is an injury "of the type the antitrust laws were designed to prevent"; and (4) that the injury "flows from that which makes [the defendant's] acts unlawful." *Id.*, 479 at 113; *Brunswick Corp., supra*, 429 U.S. at 489. "The injury or damage claimed must 'match' the violation and reflect the reason for finding a violation." P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 334.3a, p. 332 (Supp. 1989).

The Bulls and WGN have each suffered or are threatened with injury. Five fewer games means losses in revenues for both of them. There are also nonmonetary injuries. For the Bulls, five fewer games on WGN means less exposure and fewer opportunities to build a strong and permanent following. For WGN it means lost opportunities to run high-profile, on-air promotions for the rest of its programming during Bulls telecasts which draw big audiences. In addition, both the Bulls and WGN stand to suffer

injuries to their reputations and to the good will their telecasts generate among viewers. The NBA does not dispute this.

The NBA argues, however, that all these harms, threatened and actual, are self-inflicted rather than caused by the 5-game reduction, that the Bulls and WGN have injured themselves by "their own failure to take advantage of reasonable business options open to them." NBA's Rule 41 Motion to Dismiss at 5. The Bulls have, says the NBA, put themselves on the spot by selling rights to WGN in the first place, rather than to WPWR or WFLD, and by agreeing, moreover, to give WGN exclusive rights, a move which keeps them from going back into the market to sell not just the 5 games the rule takes away but as many as 21 more games to any other station in Chicago. Likewise, says the NBA, any injury threatened to WGN is its own fault, since WGN could broadcast as many as 41 games by covering over 21 on the microwave; could, in lieu of the 5 Bulls games, substitute other programming which would reach the same audience and attract the same advertising dollars; and could have bid for the NBA's national contract.

Logically, the NBA's argument has holes. If I swing my fist at your face, you may decide to duck. But if you stand still, and I deck you, I am the cause of your injury. You did not punch yourself.

The NBA, by reducing by 5 the number of superstation games available to the Bulls and WGN, has caused injury in fact. That the Bulls and WGN might have sidestepped that injury does not change the chain of causation -- or establish that the "fault" of the parties should be compared, if the 5-game reduction proves unlawful. Plaintiffs do not ordinarily have an obligation to change their behavior in order to escape injury from the unlawful acts of defendants; and this is not a case where assumption of risk, last one to the nuisance, nor even joint care should be the rule. The Bulls and WGN have signed a contract. The NBA has attempted to interfere with that contract. If the interference amounts to an unlawful restraint of trade, by the teams in concert, then it is no defense that no injury would have resulted if only the contract had

never been signed or if the bargain had been struck on different terms.

The NBA also contends that there would be no injury to either WGN or the Bulls if only WGN would cover over its Bulls games, pointing out that WGN could actually broadcast up to 41 games by covering 21 on the microwave feed. That argument ignores that WGN reaps profits from broadcasting the Bulls nationwide, profits which it would lose by covering over Bulls games, and also that the Bulls profit from the national coverage since their contract with WGN is based on a profit sharing arrangement. Even if WGN could cover over its games, and prevent them from being retransmitted by United Video nationwide, both the Bulls and WGN would still suffer antitrust injury in the form of lost revenues.

In addition, the NBA's argument that the Bulls and WGN would not be injured if WGN simply covered over its Bulls broadcasts has other problems. It assumes that WGN could prevent United Video from retransmitting portions of its signal. That is not clear. Specifically, the NBA assumes that Bulls games broadcast over-the-air but not sent over the microwave would not be picked up by United Video and retransmitted nationwide. Jeffrey Treeman, senior vice president of United Video, testified, however, that "if we [United Video] saw that there was programming coming to the microwave feed that was not on the air, I believe at this point I would ask our up-link to switch to the off-air [over-the-air] signal . . . I think we would go to the over-the-air." Tr. at 410-412.

It seems unlikely that United Video would "go to the over-the-air" and abandon the microwave signal altogether just to get the Bulls games. Receiving WGN's signal over the microwave, rather than pulling it off the air, gives United a better quality signal and also enables it to offer cable operators a black-out free signal by having WGN handle the Syndex substitutions, which either United Video or the cable operators would otherwise have to handle themselves, at greater cost and not as well. United Video is no doubt less than anxious to give up the superior signal

it receives over the microwave and return to the business of doing Syndex substitutions itself. But it might not have to. Short of using WGN's over-the-air signal 24 hours a day, just to get Bulls games, United Video might mix and match -- picking up WGN off the air for Bulls games but then switching back to the microwave for the rest of the broadcast day.

The NBA argues that WGN could cover over Bulls games and United Video could not mix and match without jeopardizing its status as a common carrier. Treeman, however, testified that United Video believes that its status as a common carrier depends on its faithful delivery of WGN's over-the-air signal, with exceptions for commercials and programming protected by Syndex. Therefore, Treeman said, United Video presently considers that it could lawfully, and might in fact be required, to mix and match between what was going over-the-air on WGN and what it was receiving over the microwave, if there were ever a variance, except for commercials and Syndex, between the two -- for instance, if WGN were to begin covering over its Bulls broadcasts on the microwave, in order to prevent them from going out nationwide. The issue has never been litigated. In any event, even if WGN could cover over its Bulls games and hoard them from United Video, the Bulls and WGN would, as mentioned already, still suffer antitrust injury, given the profits they earn from televising Bulls games nationwide.

The NBA has presented two more arguments connected to standing. The first is that the Bulls are not proper plaintiffs to complain about an output restriction. This is correct on one level. The Bulls stand to profit from the 5-game reduction to the extent that the NBA, by dictating to the teams how many games they may sell to superstations, manages to restrict overall output and raise prices. The antitrust injury if any which flows from higher prices belongs to the networks which must pay higher rights fees, advertisers to whom they pass on their costs, and fans who are stuck with fewer games. But it is not the case, as the NBA asserts, that the Bulls have simply brought this action as suppliers of injured customers, whom they have no standing to represent.

The complaint filed by the Bulls does not state, expressly, that the league's superstation rules restrain competition between the Bulls and the league or the Bulls and other teams. It should have. But the Bulls' briefs and their proposed conclusions of law, as well as the evidence and arguments presented at trial, leave no doubt that the Bulls were alleging injuries to their own opportunities as competitors. The Bulls have shown and alleged much more than business losses resulting from harm to WGN or to their fans, the losses of a supplier with injured customers. They have argued and shown what is obvious -- that the 5-game reduction restrains competition among competitors selling rights in televised basketball by limiting the role of the individual teams in the national market and reserving that market to the league. The Bulls, to put it simply, have argued that they would be better off if they were free to compete and that the NBA's attempts to keep them from competing have injured them directly. The 5-game reduction is a classic example of a joint venture attempting to eliminate competition between itself and its members.

The Bulls' membership in the league, moreover, in no way defeats their standing. They are not seeking simply a bigger share of league profits or compensation for losses that flow from injuries to their customers. They are seeking the right to compete independently of the league for profits of their own. The requirements of antitrust injury and standing have both been met. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968); *Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 66-68 (2d Cir. 1988); *Board of Regents v. NCAA*, 707 F.2d 1147, 1150-52 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

The NBA's last argument about standing is that WGN has no standing because it has waived all rights to sue. First, WGN knew of the likelihood that the 5-game reduction might be passed at the time it contracted with the Bulls. Second, paragraph 11.1 of their contract constitutes an express waiver: "The provisions of this Agreement are subject to the terms of any existing or future [television rules adopted by the league]. [WGN] acknowledges

that it has no standing to object to any terms [of such rules] . . . or any changes therein." Third, WGN elected its remedies and waived all others by agreeing, in the contract, that either party may terminate the agreement if the league reduces the number of permissible superstation telecasts below 21.

The NBA's argument is not persuasive. Nothing in paragraph 11.1 or elsewhere constitutes a waiver of the right to raise antitrust claims against the NBA in court. At most, it constitutes a waiver of any right WGN might otherwise have had to raise objections before the Board of Governors or control how the Bulls might vote on league resolutions. WGN certainly did not waive the right to pursue remedies for prospective violations of the antitrust laws in court. And if it had purported to, we would not hesitate to void such a waiver as contrary to public policy.

Both the Bulls and WGN have sufficiently alleged antitrust injuries flowing from the NBA's conduct, if it is unlawful. Both the Bulls and WGN are proper plaintiffs in this action.

XI

The April 1990 resolution adopted by the NBA's Board of Governors, reducing by 5 the number of superstation games open to any team, restrains trade in obvious ways. Like all contracts it narrows the options of the contracting parties. It restrains "the freedom of traders." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* 340 U.S. 211, 213 (1951). Unlike most lawful contracts, it also represents a horizontal agreement among competitors to divide markets and control output, with the stated purpose of raising prices. Each team agrees to broadcast no more than 20 games into any other team's market and, with the exception of those twenty games, not to compete with the league for revenues in the national market. By allocating markets, the agreement reduces competition among the teams and between the teams and the league, as well as between superstations and other television stations and networks. By confining the teams to 20 games, the agreement places in artificial limit on supply and reduces it below the level which would prevail in a market where

the teams and the league were competing in the national market and each team was free to match demand with supply.

The 5 game reduction restricts output in the national market. As a consequence of the planned reduction from 25 games to 20, which is the only restraint at issue in this case, there would be ten fewer games shown in the national market this season than there would otherwise have been, five less on WGN and five less on WTBS. That is fewer games for superstations, for advertisers and for fans. It is an effect in the national market that is sufficient by itself to raise antitrust concerns.

The 5-game reduction also affects output in the Chicago market, at least to the extent that WGN cannot prevent United Video from picking up its over-the-air signal, in which case it could telecast up to 41 games. The new 20-game rule reduces WGN's present output by 5 games, or 20%. As the NBA points out, the 20-game rule does not prevent the Bulls from televising up to 21 more games on any other over-the-air station in Chicago, and in that sense, regulating the number of games shown on WGN may initially look like a control on out*lets* rather than out*put*, since output, as measured by the number of games, has not been directly limited.

Measuring output simply by the number of games gives an incomplete picture, however. Part of the reason teams license broadcasts to games is to generate rights fees but another is to buy exposure. There are at least two relevant "outputs" here, games and exposure, and the exposure on WGN is broader than on any other available station in Chicago. Ratings on WGN last season, in the Chicago area, were twice as high as they were for Bulls games two years ago on WFLD. For that reason, rights licensed to WGN are a different and a more desirable product from the Bulls' perspective than rights licensed to WFLD or any other available station in Chicago, and not just in terms of royalties, as evidenced by the fact that the team turned down WPWR's offer of $3.8 million for 40 games, which is more money than WGN ultimately guaranteed and more than the Bulls received from WGN last season. Games on other stations are not close substitutes for

lost games on WGN, neither for the Bulls nor, if ratings are a fair measure, for advertisers or fans. Accordingly, a reduction in the number of games on WGN results in a reduction on output in the Chicago market, notwithstanding that all the 5-game reduction directly controls is where games are shown, not how many.

The 5-game reduction also represents a concerted refusal, on the part of the teams, to deal with superstations. The refusal is not absolute. Nothing about the reduction bars the superstations from bidding for the league's national package against the networks. The agreement among the teams to boycott superstations only covers individual dealings by individual teams and then only to the extent that any team would otherwise license more than 20 superstation broadcasts in a single season. Nonetheless, the five-game reduction is a form of a group boycott. The NBA argues that the collective decision by the teams not to air more than 20 games on any superstation was not designed to disadvantage competitors, that the boycott is targeted at superstations, that the league and the teams do not compete with superstations, and that therefore, the 5-game reduction should not be characterized as a boycott. Boycotts are boycotts, however, even when they target customers rather than competitors. "[T]he Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." *Kiefer-Stewart, supra*, 340 U.S. at 214. The NBA's argument has been made before and has been rejected, by the Supreme Court. *See Saint Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 542-44 (1978) and cases cited therein.

The 5-game reduction damages competition in several areas. It constrains competition between the teams and the league, by ousting teams from a portion of the national television market and allocating that portion to the league. It reduces competition between basketball on superstations and basketball on the networks, to the extent that they compete for viewers, and by the same token, also reduces competition between superstations and the networks for advertisers.

Further, by placing an artificial limit on the number of games in the market, the reduction makes supply less responsive to demand. Limiting the teams to 20 games keeps the teams from judging for themselves how many superstation games the market might bear -- and there clearly is demand as evidenced both by the audiences, outside Chicago and Atlanta, for superstation games and the interest among advertisers in buying time during those games. The number of games on television is less responsive to the preferences of broadcasters, advertisers and fans than it would be in a freer market.

The 5-game reduction also keeps viewers from deciding whether the games they want to watch will be on a superstation or on the networks. It "curtail[s] output and blunt[s] the ability of [the teams] to respond to consumer preference." *NCAA*, 468 U.S. at 120. It preempts market mechanisms by deciding for viewers, broadcasters and advertisers that they do not need games that they are currently demanding and, in doing so, "impairs the ability of the market to advance social welfare by ensuring the provision of desired goods." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("*Indiana Dentists*"). In short, it interferes with the ordinary give and take of the marketplace. Output is lower than it would be in a competitive environment. Prices may be higher. If reducing supply does not push prices up, then the NBA's plan will have failed.

The NBA's 5-game reduction, imposed by the teams, results in a significant restraint on trade.

XII

The Bulls and WGN have suggested that *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) are good law and that consistent with those precedents the horizontal agreement between NBA teams to allocate the national market largely to the league should be condemned per se. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990) (per curiam) recently confirmed that per se condemnation of horizontal agreements is still sometimes

appropriate, even after *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"), *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), and *NCAA, supra*. But in the wake especially of *BMI* and *NCAA*, it is clear that *Topco* and *Sealy* no longer stand for the proposition that every horizontal elimination of competition is automatically illegal, in case they ever did. See generally, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986). Some horizontal restraints may still be branded illegal per se, as *Palmer, supra*, shows, but the NBA's 5-game reduction is not one of them.

The Supreme Court has said that a concerted agreement among firms should be condemned, per se, when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . [rather than] increase economic efficiency and render the market more rather than less competitive." *BMI, supra*, 442 U.S. at 19-20, repeated in *NCAA*, 468 U.S. at 100. In other words, a "'naked restraint of trade with no purpose except stifling of competition,'" *BMI*, 442 U.S. at 20, quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), may be condemned after a quick look, without considering competitive justifications for it. For an example, see *Palmer*. But inquiry should not be cut off "where the economic impact . . . [of the restraint] is not immediately obvious." *Indiana Dentists, supra*, 476 U.S. at 459 (1986). If the particular restraint under attack is arguably "ancillary" to a lawful purpose, see *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), and seems capable of enhancing competition rather than suppressing it, then the Rule of Reason applies. The restraint should not be condemned without examining its "redeeming virtues." This is as true, moreover, for restraints with overtones of a group boycott as for others. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

A quick look here does not yield any absolute conclusions about the probable impact of the 5-game reduction. Arguably,

controlling the number of NBA games available on superstations could enable the NBA to compete more effectively in the television marketplace against other programming, justifying the restraint. Cf. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988) ("interbrand competition is the primary concern of the antitrust laws"); *Sylvania, supra*, 433 U.S. at 54-56 (discussing the redeeming, procompetitive virtues of intrabrand restraints). See also *NCAA*, 468 U.S. at 115 n.56, citing *GTE Sylvania* ("If the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete."). At a glance, it is not possible to say that the 5-game reduction, though it clearly restrains competition, is "a naked restraint of trade with no purpose except stifling of competition" and with no possibility for promoting it. Accordingly, the Rule of Reason applies.

The object of a Rule of Reason inquiry, as in any antitrust analysis, is "to form a judgment about the competitive significance of the [challenged] restraint." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("*Professional Engineers*"). That the 5-game reduction constitutes a restraint is readily apparent, which shifts the burden to the NBA to establish, as an "affirmative defense," *NCAA*, 468 U.S. at 113, that the reduction boasts some redeeming virtues -- that it embraces objectives that are legitimate in principle, that it significantly advances those objectives, and that it is an at least reasonable means of advancing them. *Indiana Dentists*, 476 U.S. 47; *Professional Engineers*, 435 U.S. 679; *NCAA*, 468 U.S. 85. Not all objectives or claimed benefits are legitimate in principle. The Rule of Reason does not open the door to just any manner of justification or to claims that the restraint broadly advances the public interest. On occasion, the Supreme Court has suggested that only competition counts, that "inquiry is confined to a consideration of impact on competitive conditions" and that a sufficient justification for a restraint must show that the restraint, which seems superficially to impede competition, really doesn't. See *Professional Engineers*, 435 U.S. at 690.

The NBA describes the redeeming virtues of its 5-game reduction as follows. The reduction "protects the teams' grant of exclusivity in their local markets," and "enhances the value" of the teams' "local television contracts by protecting the exclusivity of those contracts from dilution caused by the importation of games from other NBA cities by reason of superstation telecasts." It also "promotes" the teams' "media and sponsor relationships." It "protect[s] the value of the market extension agreements pursuant to which cable systems pay a fee shared equally by all NBA teams for the right to telecast local cable games in a team's extended market." It "enhances the ability of the NBA to grant exclusive and lucrative national broadcast contracts" and "protects the value" of those contracts. It "ensures the League is compensated for all national exposure of its games." It "preserves the price sponsors pay for national exposure on NBA national cablecasts and broadcasts." It "promotes the NBA's relationship with the national broadcast and cable networks." It "enhances the perception in the marketplace that the NBA offers a unique product and has control over that product." It "fosters the development by the NBA of new technologies." It "improves the level of competition in the television market and benefits consumers by making the NBA a stronger competitor and by providing greater national network coverage of NBA games." And, "[i]n the long run, if the NBA as a league has no right to regulate the national distribution of NBA games by individual teams, the attractiveness of the league's national television product will be undermined, its national and local revenues will decline, the weaker teams will face financial difficulties, and the league's future will be threatened." NBA's Proposed Findings of Fact, ¶ 389 (a-h), and Proposed Findings of Law, ¶¶ 102-106.

Most of the NBA's asserted justifications must be rejected on principle. The antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Maximizing revenues and "protecting the value" of individual team or NBA contracts are not legitimate justifications by themselves for restraining trade by limiting output.

"We do it because it's more profitable" is not a defense under the Sherman Act.

The league's concern that superstations buy on the cheap the same product that the national networks pay millions of dollars for, and through sales which currently generate no shared revenues for the teams, with the exception of the small sums received from the Copyright Royalty Tribunal, is understandable. But the Copyright Act of 1976, whether wisely or foolishly, has created a regulatory environment in which superstations may lawfully do just that and would not be good capitalists if they did not. The effect may be to lessen the league's leverage with the networks, though on this record that is not clear. The NBA, however, may not restrain trade, without a showing that the restraint is reasonable, just in order to win back leverage that the copyright laws may have taken away.

The NBA's strongest defense under the Sherman Act is that the 5-game reduction, though it dampens competition in the television market for NBA basketball, actually promotes competition in another market -- between the NBA's network packages and other network programming and between local NBA broadcasts by the teams and other local programming. The NBA, however, produced no evidence to confirm that effect.

The NBA produced no credible evidence, statistical or anecdotal, to suggest that superstation broadcasts of the Bulls, the Hawks or the Nets, on WGN, WTBS and WWOR, steal viewers away from any other team's local broadcasts or limit the number of games the team's have been able to sell in their local markets. The Commissioner opined, apparently by intuition, that superstations, by trespassing in local markets, hurt ratings for local NBA broadcasts. Tr. p. 1011. But no data showing any adverse effect on local ratings was ever introduced.

No representative from any of the teams or from any local station appeared to testify that superstation broadcasts have damaged carriage, ratings or revenues.

There is no support in the record for a finding that NBA broadcasts on WGN or any other superstation adversely effect the ability of any team to broadcast in its own local market, and there is no persuasive reason, in the absence of hard evidence, to believe that superstations have adverse effects on local broadcasts. Dennis FitzSimons' testimony suggests, for example, that half of WGN's audience for any given Bulls broadcast comes from areas that do not have NBA teams. In those areas, there are no local NBA broadcasts with ratings that might suffer. And even in cities that do have NBA teams, there is no reason to assume adverse effects that have not been shown. Given the loyalty of most fans to their own home teams, it is not obvious that a WGN broadcast of the Bulls would attract very many viewers in L.A. on a night when the Lakers were also on the air. Nor is it obvious that when there is no head-to-head competition, because WGN has the only game on television on one night, that the availability of a Bulls game would deter very many viewers from watching the Lakers, or any other home team, on local TV the next night or two nights later. Clearly, the probabilities will vary depending on the team the Bulls are playing and also the match up for the home team's game. Actual ratings data might disprove the hunch that home team fans watch their home teams. But the NBA did not produce any ratings data on the effect, if any, superstations have in local markets.

The NBA also failed to produce evidence that superstations have any significant impact on the league's contracts with NBC or TNT. Both networks signed their present, big-dollar, four-year contracts with the NBA knowing that NBA games would also be carried on superstations and before the vote by the league owners to reduce the number of superstation games from 25 to 20. Although superstations were discussed during the NBA's negotiations with NBC and TNT, if either network had serious worries about competition from superstations, it did not act on them. Neither network asked for a contractual provision obligating the NBA to reduce the number of superstation games over the course of its four-year contract, and neither contract contains any such provision. Either network, if concerned about the number of superstation games, might have negotiated for a shorter contract in

order to consider what effect, if any, superstation games had on its ratings or its ability to sell 30-second spots to advertisers.

There is, similarly, no empirical evidence in the record to show that games on superstations result in lower ratings for games on the networks. There was opinion testimony on the subject of ratings but not even much of that. No one from CBS appeared in order to so much as hazard a guess that ratings were off last year because of competition from the 74 NBA games that were on superstations. Nor did anyone from TNT testify that superstations were having an effect on ratings this year or last year. In fact, no one from CBS or TNT, the two networks with recent experience competing with superstations on NBA games, testified at all. There was, however, testimony from a representative of NBC.

Arthur Watson, a former president of NBC Sports and the NBC executive who negotiated NBC's contract with the NBA, testified in his deposition that superstations were "of importance" to NBC because "the more restrictive a product is to others, the more valuable it is to us now and in the future from an audience standpoint and from an advertising standpoint." Dep. at 29-30. That remark, offered without elaboration, demonstrates a concern about superstations. But it says very little, if anything, about the impact of superstations on ratings (or how many games NBC might buy if there were no superstations), and it is susceptible of at least two interpretations. Watson's remark might mean that he believes that without competition from superstations NBC's NBA ratings would be higher. But he did not say that explicitly, and he offered no data to support that belief. Alternatively, he might simply have meant to say, not necessarily that ratings would be higher, but only that NBC would be in a better position to sell advertising if it could tell advertisers, that along with TNT, it was only one of two outlets for reaching national NBA audiences of any size, rather than one of four or five, counting TNT, WGN, WTBS and WWOR.

It is clear, in any event, that NBC was not so worried by superstations, and the 56 games last season on WTBS, WGN and WWOR, as to lower the price it was willing to pay the NBA for

its four-year contract. Nor did it consider superstations to be of enough importance to warrant including a provision in the contract with respect to them. The same is true of TNT.

The NBA has maintained throughout this litigation that superstations unquestionably have an effect on ratings and that the only question is how much. More than one NBA witness testified, again apparently on the basis of nothing more than intuition, that the more games there are in the market, the lower the ratings will be. As the Commissioner put it: "[T]o the extent that somebody has watched a national game [on a superstation] on Monday night and Tuesday night and Wednesday night and Thursday night and Friday night and Saturday night, that . . . person is less likely to watch the Sunday afternoon match up" on NBC. Tr. at 1091. That is not even intuitive. It is almost sheer fantasy. NBA games vary in quality and appeal according to who's playing whom. Very few viewers, even the most compulsive, are likely to watch basketball games without some regard to which teams are playing, and NBC and TNT usually televise the best match ups. For its 22 games this season, NBC is carrying the Pistons, the Lakers and the Bulls seven times each and the Celtics six. Even the most compulsive fans, the ones who watch basketball six nights a week, are likely to turn to NBC on Sundays to watch those games with those teams -- particularly if they are that basketball compulsive.

Whether network ratings for NBA games would stay the same, go up, or even go down without competition from superstations would depend on a number of factors, including how hungry viewers are for NBA games, which games the networks are carrying and which games the superstations are carrying. And the NBA's failure to put in any, even crude, statistical evidence on the effects, if any, that superstations have on network ratings leaves a critical hole in its case.

There are at least two points that should be noted here and the first point is this: widgets may be fungible but not all NBA games are created equal. WGN only televises Bulls games and only those Bulls games that NBC and TNT have not selected for themselves. Likewise for WTBS' telecasts of the Hawks. Consequently, a

viewer who wants to watch the best games, rather than just watch basketball, would tend to watch the games on NBC and TNT instead of a superstation, all other things being equal, and compulsive viewers will probably watch everything anyway. Thus, because NBC and TNT are carrying the very best games, or trying to, they are less likely to be losing viewers to the superstations than they otherwise might be, which may help explain, at least in part, why outside Chicago and Atlanta WGN and WTBS are generally drawing lower ratings across their universes for NBA telecasts than NBC and TNT.

The second point to note with respect to network ratings is that even wholly eliminating superstation telecasts of NBA basketball, rather than simply reducing the number of games by 10 (5 on WTBS this season and 5 on WGN) might not significantly increase NBC and TNT's ratings. The magnitude of any effect on ratings would depend on how saturated (or under-supplied) the market is right now and on how many rabid fans are already watching both the Sunday games on NBC (or TNT games) and superstation games. Neither NBC games nor TNT games ever go head-to-head with superstation games. If a sizeable number of the viewers who watch games on superstations are also watching the games on NBC and TNT, then reducing the number of superstation games would not tend to increase viewership for the networks.

The NBA, however, introduced no evidence whatsoever to show how many viewers are watching everything, or even most, of what's available right now. The only piece of evidence touching on that point, the testimony of an advertising consultant, Martin Wenzell, who conducted a "segmentation study" of NBA audiences for the NBA, indicated that by his estimate there are 16 million "hard core" NBA fans who, by definition, watch as many games as they can. Wenzell Dep. at pp. 38 and 74. Without some statistical proof that the superstations are costing NBC and TNT viewers, there is no persuasive reason to assume that they are, and the NBA offered no proof that they are.

The NBA also failed to prove that the networks would either buy the rights to more games or pay more for those rights but for

the superstations. It is clear that an NBA game on NBC or TNT reaches far more viewers than a game on a superstation, and if there were evidence that the networks would contract for more games, reaching more viewers, if only they were freed from competition from WGN and WTBS, then restraints on the superstations might be justified. But no such evidence was presented.

The evidence that is in the record shows that NBC bought the rights to 26 games this season and the next three seasons, at a time when the league rules still allowed as many as 25 superstation games per team, and that NBC only plans to televise 22 games this year, even though the league has now reduced the number of allowable superstation games to 20 per team. Similarly, TNT entered into its four-year contract at a time when the league rules still allowed 25 superstation games per team. The evidence also shows that in 1986 CBS signed a 4-year contract for 16 games a year -- or 10 fewer than are provided for in the current NBC contract -- at a time when there were only 24 superstations games to compete with, which is 22 *fewer* superstations games than there are now, even with the new 5-game per team reduction. On the record as it now stands, the most generous conclusion would be that it is simply impossible to tell whether the number of superstation games bears any relationship at all to the number of games the commercial or cable networks are willing to buy.

In the same vein, there is no evidence in the record that the networks would pay more for the games they buy if superstations were excluded from more, or even all, of the market for NBA games. In the last round of negotiations with the NBA, neither NBC nor TNT offered to pay a premium if superstation games were cut back. In the course of the NBC negotiations, in fact, there were no price discussions at all. The NBA put a figure on the table and NBC snapped it up. It may be doubtful, in any event, whether at current contract prices any of the networks could afford to pay an extra premium to eliminate or partially eliminate competition from superstations.

The example of Major League Baseball may be instructive. Roger Werner, a former president of ESPN and the ESPN executive who negotiated the network's recent contract with baseball, testified that during the baseball negotiations it was ESPN's view that "if [the volume of] superstation games and/or baseball games [on other networks] in general . . . could be reduced, that the value of our package would be increased and that was clearly communicated." Dep. at 18. But "as things turned out," he said, "the price of the major league baseball package got so high that it became really a moot point as to what kind of increased value might exist. We were really at a point in the ultimate bidding where there was no more money to spend . . . [L]iterally we were tapped out." Dep. at pp. 20, 22.

The record plainly establishes that the NBA's 5-game reduction restrains trade and suppresses competition between the teams and the league and superstations and the national networks. The NBA has provided no evidence establishing that the reduction promotes competition, or will, between NBA basketball games or NBA games and other television programming of any kind.

XIII

As a last defense, the NBA argues that WGN and the Bulls have failed to prove that the NBA has market power; that the 5-game reduction can have no significant anticompetitive effect in the market because the NBA does not in fact have any market power; and that under the Rule of Reason, a restraint not backed by market power is not unreasonable. The argument is a nonstarter, for two reasons.

First, the NBA has as much as conceded its own belief that it has market power. It argues now that it is simply a price taker, with no market power, that the prices of NCAA basketball, NFL football and other programming will severely constrain its ability to raise its own prices by a significant amount. But obviously it does not believe that. Its negotiations or lack thereof with NBC belie any such belief.

"Knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 239 (1918). The NBA's stated purpose for reducing superstation telecasts is to get more money from the networks the next time around. Plainly, the league thinks that it has sufficient market power to make it worth its while to restrain competition, and it is seeking to restrain competition. Of course, its belief might be wrong. The league, however, which is plainly restraining competition between itself and the teams and superstations and the networks, has "little moral standing to demand proof of power or effect when the most [it] can say for [itself] is that [it] tried to harm the public but [was] mistaken in [its] ability to do so." 7 P. Areeda, *Antitrust Law* ¶ 1509, 411 (1986).

Second, the Supreme Court has plainly stated, that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output . . . and requires some competitive justification even in the absence of a detailed market analysis." *NCAA*, 468 U.S. at 109-110, repeated in *Indiana Dentists*, 476 U.S. at 460. "We have never," the Court said in *NCAA*, "required proof of market power in such a case." 468 U.S. at 110.

Concededly, the 5-game reduction is not a classic "naked restraint." It is not a restriction on output strictly for its own sake, condemnable per se. In other words, it is not entirely "naked" on a first examination. The NBA has dressed it up slightly, arguing that it is ancillary to a plausible and legitimate objective -- improving the league's product and making it more competitive against competing products in the television market. But the restraints in *NCAA* and *Indiana Dentists*, were not classically naked in that sense either, as the Court conceded.

In *Indiana Dentists*, the dentists had dressed their concerted refusal to cooperate with the insurance companies behind a garb of improving patient care. But that did not keep the Court, having rejected the dentists' "patient care" defense, from treating their conspiracy as naked and condemning it, even without "specific

findings . . . concerning the definition of the market" or the dentists' "power . . . in that market." *Indiana Dentists*, 476 U.S. at 460. See also *NCAA*, 468 U.S. 85 (At least some "horizontal restraints on competition" were "essential" if the NCAA's "product [was] to be available at all," 468 U.S. at 101, but the NCAA's television plan was not one of them. It was neither "necessary to market the product . . . [nor] to enable the NCAA to penetrate the market through an attractive package sale," *id.* at 114-115, and was therefore still "naked," *id.* at 110, and could be condemned without "a detailed market analysis," *id.*, or proof of market power.)

The NBA's 5-game reduction falls in the same category as the restraints in *Indiana Dentists* and *NCAA*. Its adverse anticompetitive effects have been established, and the justifications that have been offered in its defense are inadequate, at least on the present record. There is no evidence that it serves any legitimate objective. It stands, therefore, as a naked restraint, subject to condemnation even without proof of market power. See P. Areeda, *Rule of Reason -- A Catechism on Competition*, 55 Antitrust Law Journal, 571, 577-78 (1986).

Defining a precise market and requiring proof of market power would, moreover, add nothing to the antitrust analysis in this case. "Since the purpose of the inquiry into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as the reduction of output,' can obviate the need for inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Dentists*, 476 U.S. at 460-461, quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, 429 (1986).

The purpose of defining a market is to help estimate market shares, and the purpose of estimating market shares is to estimate the potential for adverse effects. But in this case, adverse effects are directly observable. Surrogates for those effects are not needed. The 5-game reduction demonstrably reduces the number of games available to viewers nationwide and the options open to advertisers for reaching those viewers, as well as the competition

between teams and the league, and superstations and the networks in the national television market, and without evidence of any commensurate gains. Under the circumstances, market power is not a prerequisite to condemnation under the Rule of Reason.

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade, supra*, 246 U.S. at 238. On the present evidence, the restraint imposed by the 5-game reduction suppresses competition without promoting it. It is therefore unlawful.

XIV

It is apparent from the foregoing discussion that the Sports Broadcasting Act, enacted in 1961, and the 1976 amendments to the Copyright Act, which added Section 111 and the concept of a compulsory license, are products of an earlier day in television and particularly sports broadcasting. The SBA's distinction between sponsored or free TV and pay TV is meaningless today, since virtually all over-the-air and cable TV broadcasts carry advertising from commercial sponsors. And Section 111 predates microwave transmission of superstation signals to a cable common carrier such as United Video. Superstations now have the ability to cover over some of their transmissions and do so with respect to commercials and programs subject to Syndex. As a result, it is not clear whether, if the superstation "covers over" portions of its programming, for instance Bulls games, by replacing them with substitute programming on the microwave, the common carrier must seek to intercept and transmit the covered over programming from the superstation's over-the-air signal or whether it can transmit the substitute programming being sent by the superstation on the microwave, as it does for Syndex, and not lose its common carrier status.

Although we have no problem deciding this case on the basis of the statutes as they now stand, it has become apparent to us that some modernizing of the those statutes might well be desirable.

XV

A final word. The NBA, we were informed, has commissioned a study, which will be completed this year, into the various aspects of its TV broadcast policy. That study or future contract negotiations may provide some reliable data, rather than intuition, as to the effect, if any, superstations have on competition and national distribution of NBA games. On the present record, it is clear that the NBA has made great strides and signed very favorable four-year contracts even with each superstation entitled to transmit 25 of its local team's games. The NBA's decision to reduce that number to 20, clearly a significant restraint of trade, has not been shown, on the evidence presented to us, to achieve or contribute to any legitimate objective by increasing availability of the NBA product to more consumers or increasing competition in the broadcast of NBA games or between NBA games and other forms of TV programming. On the contrary, the 5-game reduction will reduce availability and competition in the hope of raising the price of the product in the future. Such a restraint is unreasonable and therefore unlawful. It should be restrained. An appropriate judgment and injunction will be entered.

ENTER:

/s/

Hubert L. Will
United States District Judge

DATED: January 24, 1991

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY, *Plaintiffs*, — v. — NATIONAL BASKETBALL ASSOCIATION, *Defendants*.	**No. 90 C 6247** Judge Hubert L. Will Magistrate Ronald A. Guzman

JUDGMENT PURSUANT TO RULE 54(b)

For the reasons set forth in this Court's January 24, 1991, Findings of Fact, Conclusions of Law and Opinion:

IT IS HEREBY ORDERED THAT:

1. Defendant National Basketball Association, its officers, agents, employees, members, attorneys and all persons or entities in active concert or participation with the NBA are permanently enjoined and restrained from enforcing against plaintiffs the resolution adopted by the NBA Board of Governors at its meetings on April 23-24, 1990, or any similar rule, regulation or resolution with the effect of preventing, or attempting to prevent, plaintiff Chicago Professional Sports Limited Partnership from broadcasting twenty-five games over plaintiff WGN Continental Broadcasting Company in any NBA season. This Court shall retain jurisdiction to enforce this injunction.

Dated: January 24, 1991

ENTER:

/s/

Hubert L. Will
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Plaintiffs,

— v. —

NATIONAL BASKETBALL ASSOCIATION,

Defendants.

No. 90 C 6247

Judge Hubert L. Will

Magistrate
Ronald A. Guzman

ORDER AND PARTIAL FINAL JUDGMENT

This matter came on for trial on a request for a permanent injunction by the plaintiffs Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company. The Court heard evidence and arguments from December 17 through 21, 1990, and reviewed the pleadings, the briefs, the relevant exhibits and designated deposition testimony. For the reasons set forth in this Court's January 24, 1991, Findings of Fact, Conclusions of Law and Opinion:

IT IS HEREBY ORDERED THAT:

1. Defendant National Basketball Association, its officers, agents, employees, members, attorneys and all persons or entities in active concert or participation with the NBA are permanently enjoined and restrained from enforcing against plaintiffs the resolution adopted by the NBA Board of Governors at its meetings on April 23-24, 1990, or any similar rule, regulation or resolution with the effect of preventing, or attempting to prevent, plaintiff Chicago Professional Sports Limited Partnership from broadcasting twenty-

five games over plaintiff WGN Continental Broadcasting Company in any NBA season. This Court shall retain jurisdiction to enforce this injunction.

2. This Court finds that there is no just reason to delay the entry of the judgment on plaintiffs' request for a permanent injunction and, pursuant to Fed. R. Civ. P. 54(b), directs the Clerk of this Court to enter a judgment in favor of plaintiffs Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company, and against defendant National Basketball Association, in accordance with paragraph 1 of this order.

Dated: January 28, 1991

ENTER:

/s/

Hubert L. Will
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 4, 1992.

BEFORE

Hon. WILLIAM J. BAUER, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,
Plaintiffs-Appellees,

No. 91-1434 v.

NATIONAL BASKETBALL ASSOCIATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 90 C 6247
Hubert L. Will,
Judge.

ORDER

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on April 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

CASES APPLYING SECTION 1 OF THE SHERMAN ACT TO RULES ENACTED BY PROFESSIONAL SPORTS LEAGUES

First Circuit:

Catrone v. Ogden Suffolk Downs, Inc., 683 F. Supp. 302 (D. Mass. 1988).

Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

Boston Professional Hockey Ass'n, Inc. v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972).

Second Circuit:

Volvo North Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55 (2d Cir. 1988), *rev'g* 678 F. Supp. 1035 (S.D.N.Y. 1987).

United States Football League v. NFL, 842 F.2d 1335 (2d Cir. 1988), *aff'g* 644 F. Supp. 1040 (S.D.N.Y. 1986).

North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), *rev'g* 505 F. Supp. 659 (S.D.N.Y. 1980).

Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc., 609 F. Supp. 677 (S.D.N.Y. 1985).

Shayne v. NHL, 504 F. Supp. 1023 (E.D.N.Y. 1980).

American Basketball Ass'n Players Ass'n v. NBA, 404 F. Supp. 832 (S.D.N.Y. 1975).

Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975).

Levin v. NBA, 385 F. Supp. 149 (S.D.N.Y. 1974).

Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972).

United States v. Bowling Proprietors' Ass'n of Am., Inc., 1967 Trade Cas. (CCH) ¶ 72,105 (S.D.N.Y. 1967).

Washington Professional Basketball Corp. v. NBA, 131 F. Supp. 596 (S.D.N.Y. 1955).

Third Circuit:

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Fifth Circuit:

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Sixth Circuit:

McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979), *rev'g* 460 F. Supp. 904 (E.D. Mich 1978).

Seventh Circuit:

Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667 (7th Cir. 1992), *aff'g* 754 F. Supp. 1336 (N.D. Ill. 1991).

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Eighth Circuit:

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District of Columbia Circuit:

Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978), *aff'g* 420 F. Supp. 738 (D.D.C. 1976).

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir 1971), *cert. denied*, 404 U.S. 1047 (1972), *rev'g* 312 F. Supp. 472 (D.D.C. 1970), *appeal after remand*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), *rev'g* an unreported opinion.